



Asset Forfeiture Policy Manual **2013**

The Policy Manual was revised on March 22, 2014, to include a new section on Quick Release. See Chapter 1, Sec. 1.E.

Foreword

This is the *Asset Forfeiture Policy Manual*, a compilation of policies governing the Justice Department's Asset Forfeiture Program. It replaces and supersedes all previous versions of the *Policy Manual* and all Policy Directives and Interim Legal Advice Memoranda. The *Policy Manual* will henceforth be published in hardcopy, and will be available online at <http://www.justice.gov/criminal/afmls/pubs/>.

This *Policy Manual* reflects policies that have changed since its last publication in 2012. Notable new policies include: Chapter 1 on seizure and restraint includes a new approval requirement by the Asset Forfeiture Management Staff prior to the seizure or forfeiture of any asset that may create a deficit to the Assets Forfeiture Fund; Chapter 9 on international asset forfeiture includes the recent delegation to the Assistant Attorney General and Chief of the Asset Forfeiture and Money Laundering Section to decide uncontested international equitable sharing requests; and Chapter 12 on the compensation of victims of crime includes information regarding the new vendor contract for the use of trustees in multi-victim cases. In addition, Chapter 10 on the use of trustees and monitors was completely revised for the 2013 edition. Many other chapters have seen significant revision. The Asset Forfeiture and Money Laundering Section anticipates that the process of revising each of the chapters of the *Policy Manual* will continue until the next issue is printed in 2014.

Some topics that require extended treatment, such as financial investigations, interlocutory sales, and expedited settlements, are addressed at length in stand-alone publications at <http://www.justice.gov/criminal/afmls/pubs>. These additional guides supplement but do not supersede the policies set forth in the *Policy Manual*.

The *Asset Forfeiture Policy Manual* sets forth the policies of the Asset Forfeiture and Money Laundering Section. It does not, however, create or confer any legal rights, privileges, or benefits that may be enforced in any way by private parties. *See United States v. Caceres*, 440 U.S. 741 (1979).

We recommend that the following format be used in citing this *Policy Manual*: *Asset Forfeiture Policy Manual* (2013), Chap. ___, Sec. ___. (e.g., Chap. 1, Sec. I.A).

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Approval, Consultation, and Notification Requirements

Topic	Requirement	Reference
Administrative Forfeiture	<i>Headquarters</i> of seizing agency must be consulted where a civil or criminal forfeiture agreement requires an administrative forfeiture.	Policy Manual Chap. 3.IV USAM 9-113.103
Attorneys' Fees	<i>Assistant Attorney General</i> must give approval to enter into a formal or informal, written or oral agreement, to exempt from forfeiture an asset transferred to an attorney as fees for legal services, including those restrained as substitute assets.	Policy Manual Chap. 7.II USAM 9-120.116
Attorneys' Fees	<i>Assistant Attorney General's</i> approval is required for any action to institute a criminal or civil forfeiture proceeding against an asset transferred to an attorney as a fee for legal services.	Policy Manual Chap. 7.II USAM 9-120.112
Business Entities	<i>USAO</i> must consult with <i>AFMLS</i> prior to seeking forfeiture of a business on the theory that it facilitated money laundering.	Policy Manual Chap. 1.I.D.5 USAM 9-105.330
Business Entities	<i>USAO</i> must consult with <i>AFMLS</i> prior to filing indictment, information, or complaint in any forfeiture action against, seeking the seizure of, or moving to restrain an ongoing business.	Policy Manual Chap. 1.I.D.5 USAM 9-111.124
Business Entities	<i>USAO</i> or <i>USMS</i> must notify <i>AFMLS</i> and <i>Justice Management Division, Asset Forfeiture Management Staff</i> when they learn that a restrained or seized business is losing money, has contingent liabilities or has insufficient equity.	Policy Manual Chap. 1.I.D.5, Chap.10.IV
Business Entities	<i>Justice Management Division, Asset Forfeiture Management Staff</i> must give approval, in coordination with <i>AFMLS</i> , if the restraint, seizure or forfeiture of a business could create a deficit to the Assets Forfeiture Fund.	Policy Manual Chap. 1.D.4, Chap. 10.IV
Business Entities: Trustees & Monitors	<i>USAO</i> must consult with <i>AFMLS</i> before seeking appointment of a trustee, monitor, or similar fiduciary.	Policy Manual Chap. 10.I.C
Correspondent Accounts	<i>AFMLS</i> must give approval before serving a restraining order, seizure warrant, or warrant of arrest on a correspondent bank account under 18 U.S.C. § 981(k) (chief of <i>AFMLS</i> will get concurrence from director of OIA).	Policy Manual Chap. 9.VII Memorandum from AAG Chertoff USA Patriot Act, Section 319, codified at 18 U.S.C. § 981(k)
Correspondent Accounts	<i>AFMLS</i> must give approval before the <i>AAG</i> can issue summonses or subpoenas to foreign banks that maintain correspondent accounts in the United States to get records (chief of <i>AFMLS</i> will get approval from OIA as well).	Memorandum from AAG Chertoff AG order delegating authority to AAG USA Patriot Act, Section 319, codified at 31 U.S.C. § 5318(k)
Deposit of Seized Cash	<i>AFMLS</i> must give approval for exceptions to the policy requiring prompt deposit of any seized cash into the Seized Asset Deposit Fund (delegated by AAG) unless the seized cash is less than \$5,000.	Policy Manual Chap. 1.VI USAM 9-111.600

Topic	Requirement	Reference
EAJA Awards	<i>AFMLS</i> must give approval to use funds to pay EAJA awards arising from forfeiture actions.	Policy Manual Chap. 7.I.B USAM 9-117.210
Equitable Sharing/ Official Use	<i>Chief of AFMLS</i> has the authority to rule on equitable sharing requests for judicially and administratively forfeited assets in which (1) the property to be shared is valued between \$1 million and \$5 million, and (2) <i>AFMLS</i> , the seizing agency, and the <i>USAO</i> agree on the sharing.	Policy Manual Chap. 6. I.D.3.a
Equitable Sharing/ Official Use	<i>Assistant Attorney General</i> has the authority to rule on equitable sharing requests if the property is over \$5 million and <i>AFMLS</i> , the seizing agency, and the <i>USAO</i> all agree on the sharing.	Policy Manual Chap. 6.I.D.3.b
Equitable Sharing/ Official Use	<i>Deputy Attorney General</i> must approve equitable sharing in cases involving (1) multiple districts, (2) real property transfers to a state or local agency for law enforcement related use, or (3) disagreement among the <i>USAO</i> , <i>AFMLS</i> , and seizing agency on the sharing, regardless of the property value.	Policy Manual Chap. 6.I.D.3 USAM 9-116.210 USAM 9-118.540 <i>USAM</i> says the <i>Deputy Attorney General</i> must approve equitable sharing in cases involving (1) \$1 million or more in forfeited assets, (2) multi-district cases, or (3) cases involving real property transfers to a state or local agency for law enforcement related use. <i>AFMLS</i> is coordinating with <i>EOUSA</i> to update the <i>USAM</i> to reflect the new updated delegations.
Equitable Sharing/ Official Use	<i>Assistant Attorney General</i> and <i>Secretary of State</i> approval required before forfeited assets can be shared internationally.	Policy Manual Chap. 6.VII, Chap. 9.XIII USAM 9-116.400
Equitable Sharing/ Official Use	<i>AFMLS</i> should be notified if seizing agency decides to place property into agency's official use and the property is valued at \$50,000 or more.	Policy Manual Chap. 5.VI USAM 9-118.440
Foreign Property	<i>AFMLS</i> (which will consult with <i>OIA</i>) must be consulted when seeking repatriation of forfeitable assets located abroad.	Policy Manual Chap. 9.VI
Foreign Property	<i>AFMLS</i> and <i>OIA</i> must be consulted before filing an in rem forfeiture action based on 28 U.S.C. § 1355(b)(2).	Policy Manual Chap. 9.X USAM 9-119.103
Foreign Property	<i>AFMLS</i> (which will consult with <i>OIA</i>) must be consulted before taking steps to present a foreign government for enforcement or recognition of any civil or criminal forfeiture order entered in the United States for property located within the foreign jurisdiction.	Policy Manual Chap. 9.XII USAM 9-13.526
Liens/Mortgages	<i>AFMLS</i> must approve any requests for payment of liens and mortgages in excess of sale proceeds.	Policy Manual Chap. 5.III.A <i>Expedited Forfeiture Settlement Policy I(B)</i> does not require approval, only encourages consultation with <i>AFMLS</i> USAM 9-113.800

Topic	Requirement	Reference
Plea Agreements or Settlements	<i>USMS</i> and the seizing agency must be consulted during negotiation of settlements.	Policy Manual Chap. 3.I.B.2 USAM 9-113.102
Plea Agreements or Settlements	<i>Deputy Attorney General</i> must approve settlements where the amount to be released exceeds \$2 million and 15 percent of the amount involved.	Policy Manual Chap. 3.III USAM 9-113.200
Plea Agreements or Settlements	<i>Chief of AFMLS</i> has authority to approve a forfeiture settlement unless the amount to be released exceeds 15 percent of the amount involved and is greater than \$2 million, and the amount involved is greater than \$1 million.	Policy Manual Chap. 3.II–III USAM 9-113.200
Plea Agreements or Settlements	<i>U.S. Attorney</i> may approve any settlement in a criminal or civil forfeiture claim if (1) the amount involved is less than \$1 million, regardless of the amount involved, or (2) the amount involved is between \$1 million and \$5 million, if the amount to be released does not exceed 15 percent of the amount involved.	Policy Manual Chap. 3.II USAM 9-113.200 USAM says cases not in excess of \$500,000 and cases between \$1 million and \$5 million provided the amount released is not more than 15 percent of the amount involved. AFMLS is coordinating with EOUSA to update the USAM to reflect the new updated delegations.
Plea Agreements or Settlements	<i>Seizing agency</i> must be consulted before entering into plea agreements or settlements returning property that is the subject of administrative forfeiture proceedings.	Policy Manual Chap. 2.II.C, Chap. 3.I.B.4 USAM 9-113.103
Plea Agreements or Settlements	<i>AFMLS</i> must give approval to return property subject to administrative forfeiture as part of a plea agreement.	Policy Manual Chap. 2.II.C
Plea Agreements or Settlements	<i>USAO</i> must obtain advice and approval of <i>AFMLS</i> (in consultation with the <i>USMS</i>) prior to any settlement that provides for unsecured partial payment.	Policy Manual Chap. 3.I.B.8 USAM 9-113.107
Plea Agreements or Settlements	<i>USAO</i> must obtain approval of <i>IRS</i> prior to any settlement that allows forfeitable proceeds to settle a defendant's tax obligations.	Policy Manual Chap. 3.I.B.10
Pre-seizure Planning	<i>USMS</i> must be consulted as part of the pre-seizure planning process prior to seizure/restraint and forfeiture of assets.	Policy Manual Chap. 1.I.A USAM 9-111.110
Pre-seizure Planning	<i>USAO</i> must give approval prior to the release of sensitive law enforcement information to third party contractors for the purpose of pre-seizure planning.	Policy Manual Chap. 1.I.B
Pre-seizure Planning	<i>Justice Management Division, Asset Forfeiture Management Staff</i> must give approval, in coordination with <i>AFMLS</i> , if the seizure or forfeiture of an asset could create a deficit to the Assets Forfeiture Fund.	Policy Manual Chap. 1.I.D.5
Real Property	<i>USMS</i> must be consulted prior to adoption of seizure of real property. <i>AFMLS</i> may authorize direct adoption of state and local seizures by U.S. Attorneys for judicial forfeiture in appropriate circumstances.	Policy Manual Chap. 1.VII.I USAM 9-116.190 Policy Manual Chap. 1.VII.G USAM 9-116.170

Topic	Requirement	Reference
Real Property	<i>USMS</i> must be consulted prior to seizure of contaminated real property.	Policy Manual Chap. 1.IV.B USAM 9-111.400 USAM says USAO should exercise its discretion.
Real Property	<i>USAO</i> must obtain the concurrence of <i>AFMLS</i> , prior to agreeing to pay a higher rate of interest on state and local property taxes of forfeited real property, provided that such higher rate is not punitive.	Policy Manual Chap. 4.I.C
Real Property	The <i>Deputy Attorney General</i> must approve real property transfers to state or local agencies for further transfer to other government agencies or non-profit agencies for use in the Weed and Seed Program.	Policy Manual Chap. 6.XI.A USAM 9-116.500
Real Property	The <i>Attorney General</i> must approve real property transfers to state or local agencies for further transfer to non-profit agencies for use in the Operation Goodwill Program.	Policy Manual Chap. 6.XI.B
Real Property	The <i>Attorney General</i> must approve real property transfers to a state for use as a recreational or historic site, or for the preservation of natural conditions.	Policy Manual Chap. 6.XI.C
Real Property	The <i>Attorney General</i> must approve a real property transfer to a federal agency for use in fulfilling a law enforcement need, or for serving a significant and continuing federal purpose.	Policy Manual Chap. 6.XI.D
Real Property	The <i>Assistant Attorney General</i> must approve real property transfers to state or local agencies for use in fulfilling a compelling law enforcement need.	Policy Manual Chap. 6.I.D. n.9
Restraining Orders	<i>AFMLS</i> review required for any proposed forfeiture restraining order in a RICO prosecution.	Criminal Resource Manual 2084
Seizure Thresholds	Supervisory level approval in the <i>USAO</i> required for any downward departure from the seizing thresholds (in writing).	Policy Manual Chap. 1.I.D.1 USAM 9-111.120

Custodial and Authority Chart

A. Department of Justice Asset Forfeiture Program

Agency/Component	Property Custodian	Statutory Jurisdiction	Seizure Authority
Asset Forfeiture Management Staff, Justice Management Division	<ul style="list-style-type: none"> Not applicable 	<ul style="list-style-type: none"> 28 U.S.C. § 524(c)(1) 	<ul style="list-style-type: none"> Not applicable
Criminal Division, U.S. Department of Justice	<ul style="list-style-type: none"> U.S. Marshals Service (USMS) for cases brought by participants in Justice Program Treasury Contractor for cases brought by participants in the Treasury Program 	<ul style="list-style-type: none"> All criminal and civil asset forfeiture statutes 	<ul style="list-style-type: none"> Not applicable
Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)	<ul style="list-style-type: none"> ATF, USMS, and the Treasury Contractor 	<ul style="list-style-type: none"> 18 U.S.C. § 981 and 982 28 U.S.C. § 2461 49 U.S.C. § 80304 	<ul style="list-style-type: none"> 18 U.S.C. § 3051
Department of Defense—Defense Criminal Investigation Service (DCIS)	<ul style="list-style-type: none"> USMS 	<ul style="list-style-type: none"> 22 U.S.C. § 2709, amended in 2005—all criminal and civil asset forfeiture statutes. Primarily, but not limited to, 18 U.S.C. § 981(a)(1)(A) (civil) and 18 U.S.C. § 982(a)(6)(A) (criminal) 	<ul style="list-style-type: none"> 18 U.S.C. § 981(a)(1)(A) (civil) and 18 U.S.C. § 982(a)(6)(A) (criminal)
Drug Enforcement Administration (DEA)	<ul style="list-style-type: none"> USMS 	<ul style="list-style-type: none"> 18 U.S.C. §§ 981, 982 21 U.S.C. §§ 824, 853, and 881 28 U.S.C. § 2461 46 U.S.C. § 70507 49 U.S.C. § 46306 	<ul style="list-style-type: none"> 18 U.S.C. § 981 21 U.S.C. § 881 46 U.S.C. § 70507 49 U.S.C. § 46306
Executive Office for U.S. Attorneys (EOUSA)—U.S. Attorneys' Offices	<ul style="list-style-type: none"> USMS for cases brought by participants in Justice Program Treasury Contractor for cases brought by participants in the Treasury Program 	<ul style="list-style-type: none"> All criminal and civil asset forfeiture statutes 	<ul style="list-style-type: none"> Not applicable
Federal Bureau of Investigation (FBI)	<ul style="list-style-type: none"> USMS 	<ul style="list-style-type: none"> 28 C.F.R. § 0.85(a)—all laws not specifically assigned to the sole jurisdiction of another agency.¹ 	<ul style="list-style-type: none"> 28 C.F.R. § 8.2

Agency/Component	Property Custodian	Statutory Jurisdiction	Seizure Authority
Food and Drug Administration—Office of Criminal Investigations (FDA-OCI)	<ul style="list-style-type: none"> USMS and Treasury Contractor (bulk evidence only) 	<ul style="list-style-type: none"> Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-397 and related Title 18 and 21 statutes 	<ul style="list-style-type: none"> Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-397 and related Title 18 and 21 statutes
U.S. Department of Agriculture—Office of Inspector General (USDA-OIG)	<ul style="list-style-type: none"> The seizing agency identifies the appropriate custodian Any animal seized under warrant authorized under this section shall be held by the United States marshal or other authorized person pending disposition of the court. 	<ul style="list-style-type: none"> 7 U.S.C. § 2024 7 U.S.C. § 2270a 7 U.S.C. § 2156 	<ul style="list-style-type: none"> Not applicable² Not applicable³
U.S. Marshals Service (USMS)	<ul style="list-style-type: none"> USMS 	<ul style="list-style-type: none"> Not applicable 	<ul style="list-style-type: none"> 28 U.S.C. § 566
U.S. Postal Inspection Service (USPIS)	<ul style="list-style-type: none"> USPIS—Administrative Forfeitures USMS—Judicial Forfeitures⁴ 	<ul style="list-style-type: none"> Pursuant to 18 U.S.C. § 3061—all matters relating to the Postal Service and the mails. Primary statutes enforced include: <ul style="list-style-type: none"> Child Exploitation (18 U.S.C. §§ 1470, 2251, 2252, 2253, 2254, 2422, and 2425) Controlled Substances (21 U.S.C. §§ 841, 843 and 844) Counterfeit Stamps, Money Orders and Related Crimes (18 U.S.C. §§ 500, 501, 503 and 1720) Destruction, Obstruction and Delay of Mail (18 U.S.C. §§ 1700, 1701, 1702 and 1703) Electronic Crimes (18 U.S.C. §§ 1029, 1030, 1037, 1343, and 2701) Extortion (18 U.S.C. §§ 873, 876 and 877) Forfeiture (18 U.S.C. §§ 981 and 982) Identity Fraud (18 U.S.C. § 1028) Lotteries (18 U.S.C. §§ 1301, 1302 and 1303 and 39 U.S.C. § 3005) Mail Fraud (18 U.S.C. §§ 1341, 1342 and 1345 and 39 U.S.C. §§ 3005 and 3007) Money Laundering (18 U.S.C. §§ 1956 and 1957) Obscenity and Sexually Oriented Advertising (18 U.S.C. §§ 1461, 1463 and 1735; and 39 U.S.C. § 3010) Theft of Mail (18 U.S.C. §§ 1708 & 1709) 	<ul style="list-style-type: none"> 18 U.S.C. § 3061(a)

Agency/Component	Property Custodian	Statutory Jurisdiction	Seizure Authority
State Department, Bureau of Diplomatic Security	<ul style="list-style-type: none"> USMS 	<ul style="list-style-type: none"> 22 U.S.C. § 2709, amended in 2005—all criminal and civil asset forfeiture statutes. Primarily, but not limited to, 18 U.S.C. § 981(a)(1)(A) (civil) and 18 U.S.C. § 982(a)(6)(A) (criminal) 	<ul style="list-style-type: none"> 18 U.S.C. § 981(a)(1)(A) (civil) and 18 U.S.C. § 982(a)(6)(A) (criminal)
Non-Justice, Non-Treasury Fund Federal Participant ⁵	<ul style="list-style-type: none"> USMS (if proceeds eligible for deposit into the DOJ AFF) 	<ul style="list-style-type: none"> TBD 	<ul style="list-style-type: none"> TBD

B. Department of the Treasury Asset Forfeiture Program

Agency/Component	Property Custodian	Statutory Jurisdiction	Seizure Authority
Executive Office for Asset Forfeiture, Department of the Treasury	<ul style="list-style-type: none"> Not applicable 	<ul style="list-style-type: none"> 31 U.S.C. § 9703 	<ul style="list-style-type: none"> Not applicable
Internal Revenue Service—Criminal Investigation	<ul style="list-style-type: none"> Treasury Contractor 	<ul style="list-style-type: none"> 18 U.S.C. §§ 981 and 982 18 U.S.C. §§ 1956 and 1957 31 U.S.C. §§ 5317 and 5324 	<ul style="list-style-type: none"> Treasury Directive 15-42
U.S. Coast Guard	<ul style="list-style-type: none"> Not applicable⁶ 	<ul style="list-style-type: none"> 14 U.S.C. § 89 14 U.S.C. § 141 14 U.S.C. § 143 	<ul style="list-style-type: none"> 8 U.S.C. § 1324 14 U.S.C. § 89 16 U.S.C. § 1861 16 U.S.C. § 3374 18 U.S.C. § 981-82 18 U.S.C. § 1028 18 U.S.C. § 1594 19 U.S.C. §§ 1581, 1590, 1594, 1595, and 1595a 19 U.S.C. § 1703 46 U.S.C. § 70507 46 U.S.C. §§ 70106 and 70118 50 U.S.C. §§ 191-92

Agency/Component	Property Custodian	Statutory Jurisdiction	Seizure Authority
U.S. Immigration and Customs Enforcement	<ul style="list-style-type: none"> Treasury Contractor 	<ul style="list-style-type: none"> Tariff Act of 1789; as amended Immigration & Nationality Act (1952); as amended 18 U.S.C. §§ 981 and 982 Title 21 Memorandum of Understanding (MOU)–1994⁷ Civil Asset Forfeiture Reform Act (2000) USA PATRIOT Act (2001) Homeland Security Act (2002) Patriot Act Reauthorization Act of 2006 	<ul style="list-style-type: none"> 8 U.S.C. §§ 1324, 1324(b) 8 U.S.C. § 1324a 18 U.S.C. § 545 18 U.S.C. §§ 981 and 982 18 U.S.C. § 1028 18 U.S.C. § 1594 19 U.S.C. §§ 1581, 1590, 1594, 1595, and 1595a 19 U.S.C. § 1703 31 U.S.C. §§ 5317 and 5332 22 U.S.C. § 401 50 U.S.C. § 1701, et. seq.⁸
U.S. Secret Service	<ul style="list-style-type: none"> Treasury Contractor 	<ul style="list-style-type: none"> 18 U.S.C. § 3056 	<ul style="list-style-type: none"> 18 U.S.C. §§ 981 and 982

C. Footnotes

¹ A specific comprehensive list can be found in the Outline of Forfeiture Law and Procedures monograph published by the FBI Legal Forfeiture Unit.

² There is a Memorandum of Understanding (MOU) between the OIG-USDA, Justice, Treasury, and USPIS establishing OIG-USDA's participation in the Justice's Assets Forfeiture Fund (AFF). OIG-USDA submits the appropriate paperwork to the seizing agency to document OIG-USDA's participation. For cases in which Postal and Treasury are the additional parties, the MOU provides for transfers to the Justice's AFF from the Postal Fund and the Treasury Asset Forfeiture Fund in forfeitures worked with OIG-USDA.

³ The federal animal fighting statute allows for the forfeiture of "any animal involved in a violation of [the statute]....." 7 U.S.C. § 2156(f). Forfeiture seizure authority under the statute was granted to the United States Marshal and "any person authorized under this section to conduct investigations".

⁴ There is an MOU between the USMS and the USPIS should the USPIS want to retain judicial property for Official Use, the USPIS may keep custody. *Note:* Some judicial districts get a substitute custodial agreement for this.

⁵ The analysis as to whether the Fund is or is not available comes down to whether the proceeds (if any) can be deposited into the AFF. If the forfeiture statute doesn't direct the disposition proceeds to go to another entity (e.g., Secretary of the Treasury or Interior) and 28 U.S.C. § 524(c)(4) does not prohibit the deposit of the funds into the AFF, then the Fund is available and the USMS should take custody of the property. If the proceeds go elsewhere, then the USMS can still manage the property (using the Fund) but must seek a reimbursable agreement with the lead agency to ensure the costs are reimbursed. If the proceeds do not cover costs, then it must come out of the agency's appropriation.

⁶ U.S. Coast Guard normally turns items seized over to other agencies, i.e., ICE, DEA, FBI, USMS. As such, those agencies would dictate the property custodian.

⁷ The Title 21 MOU dated 1994 remains in effect and negotiations are underway to update the MOU. The jurisdictional authority for ICE/CBP Title 21 use includes international, border nexus, and the functional equivalent of the border. It excludes domestic enforcement and administrative forfeiture activities.

⁸ The seizure authority for both ICE and CBP is extremely lengthy. The statutory authorities include administrative, criminal and civil seizure & forfeiture statutes and (some limited) abilities found in Titles 8, 12, 13, 15, 18, 21, 22, 26, 28, 31, 33, 39, 42, 46 & Appendix, 49, 50 & Appendix.

Chapter 1: Seizure/Restraint

I. Guidelines for Pre-seizure/Restraint Planning

A. Background

These guidelines are intended to encourage practices that will minimize or avoid the possibility that the Government will unknowingly file forfeiture actions against properties leading to losses to the Assets Forfeiture Fund (AFF) and assume unnecessarily difficult or insurmountable problems in the management and disposition of seized/restrained assets.¹ In particular, they are meant to ensure that the U.S. Marshals Service (USMS), its headquarters Asset Forfeiture Division (AFD), and other agencies with responsibility for seizing, restraining, managing, and disposing of assets are consulted before legal action is taken against forfeitable property.² Pre-seizure planning affords the opportunity for these agencies to conduct financial analyses to determine net equities of targeted assets and review title/ownership issues that may delay or prevent the Government from disposing of an asset in a timely manner following forfeiture. In addition, pre-seizure planning affords the USMS sufficient time to plan for the care of the assets, assess the level of difficulty in handling the assets and any special requirements needed to preserve the assets, and identify any special requirements needed to preserve the assets.

These guidelines direct the U.S. Attorney's Office (USAO) (or in administrative forfeitures, the agents in charge of a field office) to establish specific procedures for their respective districts or offices to ensure that critical financial and property management issues are addressed prior to seizing/restraining real property, commercial enterprises, or other types of property that may pose problems of maintenance and/or disposition (e.g., animals and aircraft). These guidelines are intended to be flexible enough to enable each USAO (or in administrative matters, the agent in charge of a field office) to establish and utilize procedures that clearly define and assign local pre-seizure/restraint planning responsibilities.

The USMS³ should be advised promptly prior to all seizures/restraints, the filing of civil forfeiture complaints, or the return of indictments containing forfeiture allegations in order to afford them sufficient time to conduct ownership/title and valuation analysis, and to identify all resources necessary to effectuate seizures.

¹ References to seizure in this chapter include criminal or civil restraint unless plainly not applicable or appropriate.

² References to USMS include other departments responsible for managing restrained and seized assets (e.g., the Department of the Treasury and the Department of Homeland Security).

³ References to USMS include USMS District Office representatives. USMS District Asset Forfeiture Coordinators (DAFC), assigned Deputy United States Marshals (DUSM), and where applicable, Asset Forfeiture Financial Investigators (AFFI) will serve as liaisons for effective coordination and communication amongst the USMS, USAO, and investigative agencies while providing the necessary research and analysis on ownership/financial interests, situational variables pertinent to the forfeiture, and forfeiture recommendations. Where assigned, the AFFI, remains available to the USAO and the investigative agencies to conduct in-depth financial analysis on assets targeted for forfeiture and to report investigative findings needed to make informed decisions.

B. Scope of assets covered by guidelines

These guidelines cover all assets considered for federal forfeiture, including assets seized by a state or local agency and adopted by a federal agency for purposes of federal forfeiture. The degree and nature of pre-seizure planning will vary depending upon the circumstances and complexity of each case.

In order for the USMS to best assist the USAOs and seizing agencies in a thorough, efficient, and most effective manner, the USMS must be involved in the investigation as soon as the USAO or seizing agency is aware assets will be targeted for forfeiture.⁴ Formal pre-seizure planning should occur well in advance of filing a civil forfeiture complaint or the return of an indictment containing forfeiture allegations. Specifically, formal pre-seizure planning requires detailed discussion of all potential issues affecting the seizure, custody, and disposal arrangements specific to an asset targeted for forfeiture. This discussion may take place either in person, by telephone, or electronically, and may be ongoing depending on the nature of the asset and stage of the case. These pre-seizure planning discussions must take place for the asset categories listed below:

- (1) residential/commercial real property and vacant land⁵;
- (2) businesses and other complex assets;
- (3) large quantities of assets involving potential inventory and storage or security problems (e.g., multiple vehicles, drug paraphernalia to be seized from multiple “headshops” on the same day, and the inventory of ongoing businesses such as jewelry stores);
- (4) assets that create difficult or unusual problems (e.g., animals, perishable items, chemicals and pharmaceuticals, leasehold agreements, intellectual property, and valuable art and antiques); and
- (5) assets located in foreign countries.

Depending upon the complexity and scope of the case, formal pre-seizure planning may continue after this initial discussion as required by either the USAO or the USMS. In many instances, the USMS will be required to procure the professional assistance of commercial vendors during the covert stage of an investigation so that services such as inventories, appraisals, transportation, and storage will coincide with a scheduled takedown date. The USMS will take appropriate measures to protect sensitive law enforcement information while consultation occurs with the involved components. No information will be released to third-party contractors without prior USAO approval.⁶ The information provided to such contractors can be limited to that necessary to procure contractor assets (e.g., towing services and storage space for 50 vehicles required in a particular location by a certain date). At all times those engaged in the pre-seizure planning process must be sensitive to operational security concerns and at no time undertake any action that could jeopardize operational security or compromise ongoing covert criminal investigations. In addition, any real property lien and title searches must be done as covertly as possible, such as through property websites, if available.

⁴ Assets in cases where a Department of Justice agency is not the lead agency may be handled by the independent contractors employed by non-Department of Justice agencies rather than the USMS (e.g., the Department of the Treasury or the Department of Homeland Security), and those independent contractors should participate in pre-seizure planning as appropriate.

⁵ For the purposes of this manual, *commercial real property* means residential real property comprised of five or more units and other real property held for commercial purposes.

⁶ See also Chap. 8, Sec. I of this *Manual*, “Disclosures of Grand Jury Information.”

Examples of the types of services the USMS may provide upon a request by either the USAO or seizing agency (as well as the usual time it takes to obtain the requested service) include the following:

Lien search and appraisal information	3-4 weeks from date of request to return information (additional time necessary for full, non-“drive-by” appraisals)	The USMS offers these services to provide USAOs and investigative agencies information during the pre-indictment, pre-seizure planning stage of a criminal or civil investigation.
Animal care	1 month prior to seizure	Proper arrangements must be made to ensure health and daily care.
Logistics services	3-6 months prior to take-down date for unusual or complex assets	Federal contracting regulations and the time necessary to coordinate with commercial vendors make it imperative to involve the USMS’ AFD as soon as such services are contemplated.
Business recommended action plan	2-4 months or longer in more complex cases	Forfeiture decisions by the USAO and the seizing agency should be made only after the USMS’ AFD conducts a documentary review of the targeted business assets and financial status.

C. General policy guidelines

Broad pre-seizure planning policy guidelines for all agencies participating in the Department of Justice’s Asset Forfeiture Program are defined below. Variations to these guidelines may be made following discussions with the Asset Forfeiture and Money Laundering Section (AFMLS).

C.1 Lead responsibility

The U.S. Attorney (or in administrative forfeiture cases, the agent in charge of a field office) is responsible for ensuring that proper and timely pre-seizure planning occurs in asset forfeiture cases within that federal judicial district. All pre-seizure planning meetings must include, at a minimum, as applicable, the Assistant U.S. Attorney (AUSA) or investigative agent in charge of the forfeiture matter (and, if applicable, the AUSA in charge of the related criminal matter), investigative agents, and the appropriate USMS representative (which should include a representative from the district where the property is to be seized and/or managed if different from the district where the action is to be filed). A federal regulatory agency representative may also attend in forfeiture cases involving federal regulatory matters as appropriate.

As a general rule, the lead agency will process all the assets. The lead agency is the agency that initiates the investigation. Another agency may be designated a lead agency if provided for in a task force agreement or memorandum of understanding. Ordinarily, assets must be processed by the lead agency only and shall not be divided among multiple agencies. For instance, a cash seizure of \$800,000 may not be divided into two \$400,000 seizures. Although exceptions may be made in extraordinary circumstances to permit individual seizures to be allocated to different agencies, no such allocation may be made without the express consent of the lead prosecuting office.

For asset forfeiture cases involving more than one federal judicial district, the USAO instituting the forfeiture action has the primary responsibility, in coordination with the investigative agency, to ensure that all Asset Forfeiture Program participants are notified and that proper and timely pre-seizure planning occurs in those districts where assets will be seized.

C.2 Pre-seizure planning overview

The intent of pre-seizure planning is to ensure the various components of the Department of Justice work together as a team, assuring that asset forfeiture is used as an effective law enforcement tool. To that end, pre-seizure planning provides the Government with the opportunity to make informed decisions on matters regarding the financial impact of forfeiting and managing assets, and on matters affecting the Government's ability to efficiently dispose of assets after forfeiture. Specifically, pre-seizure planning consists of anticipating and making informed decisions about what property is going to be seized or restrained, how and when it is going to be seized or restrained, and, most important, whether it should be forfeited at all. Pre-seizure discussions should answer at least the following, depending on asset type and circumstance:

- (1) *What is being seized, who owns it, and what are the liabilities against it?* Determine the full scope of the seizure to the extent possible. For example, if a house is being seized, are the contents also to be seized? If a business is being seized, are the buildings in which it operates, the property upon which it is located, the inventory of the business, and the operating or other bank accounts, accounts receivable, accounts payable, etc., also being seized? All ownership interests must be identified to the extent possible as well as existing/potential liabilities against the asset.
- (2) *Should the asset be seized or even targeted for forfeiture?* If the asset has a negative or marginal net equity at the time of seizure, should it be seized and forfeited? Over time, what is the likelihood that the asset will depreciate to a negative or marginal value? What law enforcement benefits are to be derived from seizure? Is a restraining or protective order an adequate alternative under the circumstances? Can any losses be mitigated by careful planning on the part of the participants? Will the asset require significant amounts of USMS or USAO resources and oversight, or considerable infusion of funds from the AFF?
- (3) *How and when is the asset going to be seized/forfeited?* Determine whether immediate seizure is necessary or if restraint of the asset is sufficient to preserve and protect the Government's interest. The type and content of the seizing instrument and authority to enter or cross private property must be communicated or provided, in advance, to both the investigative agency and the USMS to ensure that each has the necessary information and legal authority to carry out its respective seizure and post-seizure responsibilities.
- (4) *What management and disposition problems are anticipated, and how will they be resolved?* Any expected logistical issues involving the maintenance, management, or disposition of the asset should be discussed and resolved as early as possible.
- (5) *If negative net equity, management, and disposition problems are identified, what are the alternatives to forfeiture?* That is, is it possible to release to the lienholder, allow tax foreclosure and target any proceeds, turn to state or local forfeiture action, etc.
- (6) *Is any negative publicity anticipated?* If publicity or public relations concerns are anticipated, appropriate public affairs personnel should be advised and consulted. Consider preparing a press release to announce the basis and purpose of the seizure, restraint and forfeiture.

D. Pre-seizure planning questionnaires and documentation

D.1 Asset-specific net equity thresholds

These guidelines set minimum net equity levels that generally must be met, preferably before property is seized and certainly before federal forfeiture actions are instituted. The net equity values are intended to decrease the number of federal seizures, thereby enhancing case quality and expediting processing of the cases we do initiate. The thresholds are also intended to encourage state and local law enforcement agencies to use state forfeiture laws. These thresholds are to be applied in direct federal and adoptive cases. In general, the minimum net equity requirements are:

- (1) Residential/Commercial real property and vacant land—minimum net equity must be at least 20 percent of the appraised value. For properties with appraised values less than \$100,000, net equity must be at least \$20,000. For example, the minimum net equity threshold on a \$200,000 property is \$40,000.⁷
- (2) Vehicles—minimum net equity must be at least \$5,000. The value of multiple vehicles seized at the same time may be aggregated for purposes of meeting the minimum net equity. If the person from whom the vehicle is seized either was, or is, being criminally prosecuted by state or federal authorities for criminal activities related to the vehicle and there is justification for a low value seizure, the minimum net equity is \$2,000.⁸
- (3) Cash—minimum amount must be at least \$5,000, unless the person from whom the cash was seized either was, or is, being criminally prosecuted by state or federal authorities for criminal activities related to the property, in which case the amount must be at least \$1,000.
- (4) Aircraft—minimum net equity must be at least \$10,000. Note that failure to obtain the log books for the aircraft will reduce the aircraft's value significantly.
- (5) Vessels—minimum net equity must be at least \$10,000.
- (6) All other personal property—minimum net equity must be at least \$2,000 in the aggregate.
- (7) Businesses—*see* Section D.4 below.

Exceptions from the minimum net equity requirements should not be made for any individual item if it has a value of less than \$1,000. Such exceptions can be made if practical considerations support the seizure (e.g., 20 items of jewelry, each valued at \$500, might be seized, as the total value of the items is \$10,000 and the cost of storing 20 small items of jewelry is not excessive).

The U.S. Attorneys, in consultation with local federal law enforcement agencies, may institute higher district-wide thresholds for judicial forfeiture cases as law enforcement or management needs require. Similarly, a federal law enforcement agency may institute higher thresholds for administrative forfeiture cases. Written notice of any higher thresholds shall be provided to the Chief of AFMLS, the

⁷ As a general rule, the Department of Justice does not seize or adopt contaminated real properties. *See* discussion of contaminated real property in Sec. IV of this chapter.

⁸ The arrest of the person from whom the property is taken for an offense related to the illegal use or acquisition of the property for which a forfeiture action may be brought satisfies the condition of criminal prosecution. This restriction does not apply in the case of seizures by U.S. Immigration and Customs Enforcement of vehicles used in the smuggling of aliens or in the case of vehicles modified or customized to facilitate illegal activity.

USMS local office, and the special agents-in-charge of the federal law enforcement agencies in the affected judicial district. Any threshold higher than those described above must not be the basis for failing to assist in seized property in the local district when requested to do so by another district with lower monetary thresholds if the requesting district intends to file the judicial action.

In individual cases, the thresholds may be waived when forfeiture of a particular asset—e.g., a crack house, a conveyance with hidden compartments, or a vehicle used in alien smuggling seized at an international border—will serve a compelling law enforcement interest. Any waiver must be approved in writing by a supervisory-level official designated by the adopting agency, and an explanation of the reason for the waiver must be noted in the case file. The fact that the owner or person in possession of the property has been arrested or will be criminally prosecuted can be an appropriate basis for a waiver.

D.2 Pre-seizure planning questionnaires

The USMS' AFD has compiled a number of pre-seizure planning documents to assist stakeholders in making informed decisions when identifying assets for forfeiture. Obtaining the information required to complete these various documents will identify the concerns that must be addressed during the pre-seizure planning phase of a case, so as to reduce the chance a forfeiture may cause a loss to the AFF and to preserve the Government's ability to efficiently dispose of assets after forfeiture. Through consultation with the USMS, calculations for the storage and maintenance costs of particular assets can be determined, as well as the impact of potential liabilities against an asset. Individual offices may supplement these forms as they see fit. However, the basic information called for in these forms is required for adequate planning.

D.3 Net equity worksheet

When certain assets, especially residential/commercial and vacant real properties, are targeted for forfeiture, the potential net equity must be calculated as part of pre-seizure planning. In cases where information relating to titles and liens cannot be acquired without compromising the investigation, the financial analysis may be completed post-seizure.⁹ A written financial analysis facilitates, documents, and informs pre-seizure planning decisions. The USMS net equity worksheets provide step-by-step formulas for computing net equity—the estimated total amount of money the Government expects to recoup from the asset once the aggregate of all liens, mortgages, and management and disposal costs have been subtracted from the expected proceeds of the sale of the asset—and documents the results of this analysis. The USAO or the seizing agency are strongly encouraged to adopt the USMS net equity forms as they provide the most updated estimates for the management and disposal of properties based on current contract prices. These forms may be supplemented as conditions dictate.

D.3.a Ownership and encumbrances

The investigative agency is responsible for ensuring that current and accurate information on the ownership of, and any encumbrances against, personal property targeted for forfeiture is compiled and made available to the USMS and the USAO prior to seizure whenever practicable. When this is not practicable prior to the seizure, such information must be compiled and made available as soon as possible following the seizure. In instances where real property and businesses are targeted for seizure, the USMS will have primary responsibility for conducting a title search prior to seizure

⁹ See discussion of post-seizure in Sec. D.3.b.2 of this chapter.

unless otherwise agreed in individual cases. The USMS cannot conduct a complete ownership analysis for a business unless the USAO obtains, by subpoena or otherwise, appropriate ownership documents (e.g., stock record books, stock certificates, partnership agreements, etc.).

D.3.b Financial analysis: avoiding liability seizures

(1) Pre-seizure

If the financial analysis indicates that the aggregate of all liens (including judgment liens), mortgages, and management and disposal costs approaches or exceeds the anticipated proceeds from the sale of the property, the USAO, or in administrative forfeiture actions the seizing agency, must either (1) determine not to go forward with the seizure,¹⁰ or (2) acknowledge the potential financial loss and document the circumstances that warrant the seizure and institution of the forfeiture action.

(2) Post-seizure

In instances where pre-seizure planning is not possible and/or is not completed prior to seizure, the seizing agency may be responsible for custody and maintenance of the property until the USMS has had the opportunity to conduct an analysis of the assets. The USMS will complete a pre-seizure planning questionnaire as soon as practicable given the nature of the information required. Upon completion and reporting of the USMS pre-seizure analysis, a pre-seizure meeting should take place to address all issues identified. If the financial assessment indicates that the aggregate of all liens, mortgages, and management and disposal costs approaches or exceeds the anticipated proceeds from the sale of the property, in administrative forfeiture cases the seizing agency must either (1) take action to terminate the asset from the forfeiture proceeding (if any has commenced), or (2) acknowledge the potential loss and document the circumstances that warrant the continuation of the forfeiture proceeding. In judicial forfeiture cases, the USAO must either (1) take action to dismiss the forfeiture action and to void any expedited settlement agreements (if any have been entered into), or (2) acknowledge the potential loss and document the circumstances that warrant the continuation of the forfeiture action.

In deciding how to proceed with the seizure and forfeiture of potential liability seizures during the pre-seizure phase in judicial forfeitures, the USAO in consultation with the seizing agency and the USMS (and in administrative forfeitures, the agent in charge of the field office responsible for the administrative forfeiture, in consultation with the USMS) must evaluate and consider the forfeitable net equity and the law enforcement purposes to be served in light of the potential liability issues and estimated costs of post-seizure management and disposition.

D.4 Seizure/restraint of ongoing businesses and/or assets

The complexities of seizing an ongoing business and the potential for substantial losses and other liabilities from such a seizure require that a USAO consult with AFMLS prior to initiating a forfeiture action against, seeking the seizure of, or moving to restrain an ongoing business.¹¹ If the restraint,

¹⁰ The USAO may consider alternatives to seizure such as a *lis pendens* or restraint of certain assets.

¹¹ See *U.S. Attorney's Manual* 9-111.124 ("Due to the complexities of seizing an ongoing business and the potential for substantial losses from such a seizure, a United States Attorney's Office must consult with the Asset Forfeiture and Money Laundering Section prior to initiating a forfeiture action against, or seeking the seizure of, or moving to restrain an ongoing business."). See also 9-105.330 (requiring consultation with AFMLS before the USAO seeks to forfeit, seize, or restrain a business based on its involvement in money laundering).

seizure and/or forfeiture of a business could create a deficit to the AFF, prior approval from the Asset Forfeiture Management Staff (AFMS), in coordination with AFMLS, is required.

The information necessary to make an informed decision about whether an operating business should be forfeited is typically not collected by the investigative agency as part of the underlying criminal investigation. Therefore, in almost all cases, AFMLS and USMS recommend that the USAO file a restraining order or protective order that allows normal operations to continue under the review and monitoring of USMS, and concurrently allows USMS on-site access to the business to inspect the premises, review financial records, and interview employees.¹² This business review is a time-consuming process that may take 30 days or longer to complete depending on the availability of records. Upon review and analysis of the information obtained from the restraining order, the USMS will make an informed recommendation to the USAO as to whether seizure and forfeiture is advisable. The USAO should include the USMS' recommendation in its consultation with AFMLS.

Although there are many complex issues to consider in evaluating an operating business, the Government must first determine what it intends to restrain, and ultimately seize and forfeit. This determination requires analysis of the business entity itself (e.g., corporation, limited liability company, partnership, sole-proprietorship), the ownership structure of the business (e.g., the existence of other owners or partners), and whether the entity itself and/or other owners are being indicted.

The USAO should be mindful of the intricacies in targeting an ownership interest (e.g., shares of stock, membership interest, partnership shares), the assets of the business (e.g., the bank accounts, accounts receivable, inventory, equipment, licenses),¹³ or both. The wording of the restraining order and subsequent forfeiture order can impact the administration, management, and sale of the business. For example, the seizure of an ownership interest may have business law, securities law, tax law, and other regulatory ramifications that need to be considered. Alternatively, the seizure of the assets of a business can cause an operating business to fail, even if the business itself is not seized (e.g., a business that cannot use its bank account cannot continue to operate).

Protective orders and restraining orders are powerful tools because they can be drafted to allow the USMS to monitor all financial and operational activities, take signatory control over business bank accounts, and approve certain business transactions. Under the authority granted by a protective order or restraining order, the USMS will utilize internal resources to monitor and oversee business operations, and formulate a recommendation on whether seizure and forfeiture is advisable. In rare cases, a court-appointed trustee or monitor is required. *See* Chapter 10 of this *Manual*. It should be noted that the authority granted to the USMS under a protective order or restraining order does not amount to taking over the management responsibilities of business operations; this action is a last resort and should occur only after the USMS has completed a thorough business review pursuant to the protective order or restraining order.

A pre-seizure review of a business will help a USAO answer the following questions:

- Who owns the building in which the business operates?

¹² It is generally desirable to utilize the least intrusive means to gain control over the business during the pendency of litigation. *See Unites States v. All Assets Statewide Autoparts*, 971 F.2d 896 (2d Cir. 1992) (hearing and consideration of less drastic alternatives required).

¹³ In cases where the business owns real property, a *lis pendens* should be placed on the real property in conjunction with the restraining order.

- Who owns the land?
- What is the cash flow of the business?
- What are the monetary values of accounts receivable and payable?
- What other valuable assets does the business own?
- Are there significant liabilities?
- Are there environmental concerns?
- Is the business highly regulated? Is the business currently in compliance with its regulatory obligations?
- Will the business require capital contributions to remain viable?
- What law enforcement or regulatory methods or measures other than forfeiture may be effective?
- Is the business being seized as facilitating property or as proceeds of crime? Once the source of illegal funding and the illicit customers are gone, the business may no longer be profitable. If the business is facilitating illegal activity and also engaging in legal but unseemly activity, is the Government in a position to prevent or monitor the activity (e.g., Government operation of a strip club that attracts illegal drugs and prostitution)? The public may have an expectation that if the Government is operating the business, it will be able to prevent all illegal activity. See Chapter 10, Section III of this *Manual* for a discussion of security measures.
- What would it cost to hire either a business monitor or trustee and necessary staff?
- How will the business be disposed of, and how long will that process take?

A restraining order or protective order over a business should be served on the business itself, the owners, key employees (e.g., executive officers, accounting department), banking institutions holding business's accounts, and any other person or entity that has an interest in the ongoing operations of the business. Ideally, this service should occur simultaneously and in conjunction with any arrest or seizure warrants being served by the investigative agency as part of the criminal investigation. A USAO should be mindful that a criminal investigation that entails analysis of business books and records will most likely require the investigative agency to seize records that are essential to both (1) the business in order to continue operating (if anticipated) and (2) the USMS in order to initiate the business review process. The USAO, investigative agency, and USMS should formulate a plan of action beforehand outlining objectives and requirements of each agency.

During the pendency of a restraining order, the existing management personnel of the business will generally remain in place unless compelling reason warrants otherwise and the USMS is authorized under the restraining order to remove and replace such personnel. In some instances, the business may be forced to shut down temporarily (or even permanently) once key defendants are arrested or indicted. In such instances, and particularly in dealing with service-oriented industries where a large portion of the business's value is in goodwill that was generated by the defendant, it may be advisable to seek forfeiture of the assets of the business only. However, if the Government fails to achieve forfeiture and the business asset must be returned to the owner, the Government may be subject to substantial financial and adverse legal ramifications for failure to return the asset to its owner in

substantially the same condition in which it was seized. The practice of monitoring an operating business pursuant to a restraining order helps to mitigate this risk.

D.5 Compelling law enforcement interest/liability forfeitures

It is understood that in some circumstances an overriding law enforcement interest may require the seizure/forfeiture of an asset that does not meet the criteria described in section D.1. In individual cases, these thresholds may be waived where forfeiture will serve a compelling law enforcement interest (e.g., forfeiture of a crack house, a conveyance with hidden compartments, a computer or Internet domain name involved in a major fraud scheme, or assets connected to a child pornography ring or a terrorist organization). Any downward variation from the above thresholds must be approved in writing by a supervisory-level official and an explanation of the reason for the variation noted in the case file. A copy of this approval, in either a written memorandum or an e-mail, must be provided to the USMS district office that will take custody of the asset(s). If the seizure and/or forfeiture of an asset could create a deficit to the AFF (that is, the amount of the net deposit for any individual asset is less than the proposed total expenses for that asset) prior approval from AFMS, in coordination with AFMLS, is required.

E. Quick Release

E.1. Before filing of any claim

Certain property may be released after federal seizure for forfeiture but before the filing of any claim pursuant to 28 C.F.R. § 8.7 (“quick release”). This may include property that does not meet asset-specific net equity thresholds (*see* Section D.1 above), property the seizing agency determines not to forfeit after post-seizure analysis (*see* Sections D.3, D.4 above), property belonging to an innocent owner having an immediate right to possession, or other property the release of which serves to promote the best interests of justice or the Government (28 C.F.R. § 8.7(b)). While such issues ideally should be resolved in pre-seizure planning (*see* Section C.2), agencies may use post-seizure quick release whenever warranted.

When a seizing agency elects to use quick release, determining the appropriate party to whom the property should be released will depend on the nature of the seized property and the particular circumstances. If the property to be released is such that there is no registered owner, e.g., currency, usually it should be returned to the person from whom it was seized.¹⁴ If there is a registered owner of the property, such as an automobile, the property should usually be returned to that party, regardless of whether there is a lien or other third party interest with ownership rights to the property. However, if a third party such as a lienholder asserts its contractual rights in a judicial proceeding and obtains a final judgment that provides satisfactory proof of its ownership interest and right to immediate possession of the property, the seizing agency may return the property to that party instead of the registered owner. Similarly, if a state court authorizes a state or local law enforcement agency to take possession of the seized property, the seizing agency may release the property in accordance with that court order. If the seizing agency is aware of a third party with an ownership interest in the property, regardless of whether it has asserted any contractual rights to immediate possession, it may notify the third party in advance of release to the registered owner.

¹⁴ In most cases, release of funds is subject to the Treasury Offset Program (*see also* Chapter 3, Sec. I.B.10).

E.2. Declination

There may be instances in which a prosecutor declines to proceed with a judicial forfeiture after a claim has been filed in an administrative forfeiture proceeding. Once that decision is made and the federal government no longer has a legal basis for holding the seized property (*i.e.*, it is not evidence of a violation of law), the agency that seized the property becomes responsible for returning it to the appropriate party and/or initiating abandonment proceedings pursuant to 28 C.F.R. § 8.10(e). In determining the appropriate party to whom to return the seized property, the seizing agency should follow the same guidance for the return of property pursuant to quick release, including providing prompt notification to the appropriate party. A seizing agency may establish additional quick release and postdeclination return policies and procedures unique to its agency, provided that they are consistent with the guidance set forth above.

F. Trustees and monitors in forfeiture cases

See Chapter 10 of this *Manual* for the Department of Justice's policy on trustees and monitors in forfeiture cases.

II. General Procedures for Seizing Property

A. Notification by seizing agency

Most USAOs can access reports of seizures by agencies participating in the AFF in their districts from the Consolidated Asset Tracking System (CATS) database. All non-Department of Justice agencies must forward copies of seizure forms or a report of seizures to the pertinent USAO within 25 days of seizure unless an individual USAO chooses to not receive seizure notices.

B. Pre-seizure judicial review

B.1. Pre-seizure judicial authorization of property seizures

Pre-seizure judicial authorization of property seizures serves multiple purposes, including the following:

- (1) allowing neutral and detached judicial officers to review the basis for seizures before they occur;
- (2) enhancing protection for Department of Justice officers against potential civil suits claiming wrongful seizures; and
- (3) reducing the potential that the public will perceive property seizures to be arbitrary and capricious.

B.2. Pre-seizure judicial review favored for seizure of personal property

Whenever practicable, Department of Justice officials should obtain *ex parte* judicial approval prior to seizing personal property.¹⁵

¹⁵ This policy does not apply in circumstances where the owner of the property has consented to forfeiture of the property (e.g., if the owner has agreed to the forfeiture in connection with a plea agreement). Neither does it apply to the adoption for federal forfeiture of property previously seized by state or local law enforcement agencies.

C. Forms of process to be used

C.1 Warrant of arrest in rem

In a civil judicial case, the Government may take possession of personal property with an arrest warrant in rem. The procedure for issuing an arrest warrant in rem is set forth in Supplemental Rule G(3).

Under the Rule, no arrest warrant is needed if the property is already subject to a pre-trial restraining order.¹⁶ Obtaining jurisdiction over real property is addressed in section II.C.3. In all other cases, however, the Government must obtain an arrest warrant in rem and serve it on the property, generally by actual or constructive seizure of the property, to ensure that the court obtains in rem jurisdiction.

The procedure for issuing the warrant differs depending on whether the property is already in the Government's custody at the time the complaint is filed. If the property is already in the Government's custody, the warrant may be issued by the clerk of the court without any finding of probable cause by a judge or magistrate judge, but if the effect of the warrant will be to take the property out of the hands of a non-government entity, the warrant must be issued by a court upon a finding of probable cause.

Once the warrant is issued, it must be delivered "to a person or organization authorized to execute it." Rule G(3)(C). *See* section II.D.

C.2 Seizure warrant

A second form of process for seizing forfeitable property is the warrant of seizure authorized by 21 U.S.C. § 881(b) and 18 U.S.C. § 981(b)(2). This form of process requires a judicial determination of probable cause.

C.3 Seizure of real property

In general, real property is not seized prior to forfeiture, nor is it served with an arrest warrant in rem. Typically, a *lis pendens* is filed in the property records of the local jurisdiction. Filing a notice of *lis pendens* is not a seizure of the real property.¹⁷ The procedures for commencing a civil forfeiture action against real property are set forth in 18 U.S.C. § 985.

D. Responsibility for execution of process

Generally, the USMS has primary responsibility for execution of warrants of arrest in rem, while the pertinent Department of Justice investigative agency has primary responsibility for execution of seizure warrants. It is recommended that the USMS and investigative agencies coordinate execution of process.

¹⁶ *See* Supplemental Rule G(3)(a)(iii).

¹⁷ *See* 18 U.S.C. § 985(b)(2).

III. Seizures for Criminal Forfeiture

A. When is a seizure warrant or restraining order required?¹⁸

Property subject to criminal forfeiture is occasionally seized pursuant to a criminal seizure warrant issued under 21 U.S.C. § 853(f). More often, property named in a criminal indictment or information is in the custody of the Government because it was seized pursuant to a civil seizure warrant issued under section 981(b), a warrant of arrest in rem under Supplemental Rule G(3)(b)(ii), or because it was seized as evidence in the underlying criminal investigation. The question that arises is whether it is proper for the Government to maintain possession of property subject to criminal forfeiture without obtaining a section 853(f) seizure warrant in the following situations where the property was originally seized for some other purpose:

- (1) Where the initial seizure was pursuant to a civil seizure warrant or warrant of arrest in rem, and the U.S. Attorney elects to pursue criminal forfeiture after someone files a claim in the administrative forfeiture proceeding.
- (2) Where the initial seizure was without any warrant, but was based on probable cause to believe the property was subject to forfeiture when observed in plain view in a public place or pursuant to a lawful search.
- (3) Where the initial seizure was for evidence, but the evidentiary basis for the continued possession of the property has terminated.
- (4) Where the property is lawfully handed over to the federal agency for criminal forfeiture by a state court or state law enforcement agency.

B. Summary

The Government does not need to have possession of property subject to criminal forfeiture during the pendency of the criminal case, but it is perfectly appropriate for the Government to maintain possession of such property prior to the entry of a preliminary order of forfeiture as long as it has a valid basis for holding the property. The criminal forfeiture action itself is a valid basis for maintaining possession of the property only if the Government has obtained a seizure warrant pursuant to section 853(f) or a restraining order (mandating transfer of the property to Government control) pursuant to section 853(e). Absent such authority, the Government may not continue to possess property subject to criminal forfeiture unless there is an independent basis for such possession.

A seizure warrant or warrant of arrest in rem issued in a parallel civil forfeiture case provides such independent basis as long as the civil action is pending. Similarly, an administrative forfeiture action is also an independent basis for maintaining custody of an asset. Likewise, property seized for evidence may remain in Government custody as long as the evidentiary basis remains. In such cases, the Government does not need to obtain a criminal seizure warrant or restraining order to maintain possession of the property. In the absence of an administrative or civil judicial forfeiture action or if the civil forfeiture action ends, or if the evidentiary purpose for holding property terminates, then the

¹⁸ The question of whether a seizure warrant or restraining order is required does not arise where a combination civil/criminal seizure warrant is obtained pursuant to 21 U.S.C. § 853(f) and 18 U.S.C. § 983(b).

Government must obtain either a criminal seizure warrant or a restraining order under section 853(f) or (e), respectively, to maintain custody of the property pending the outcome of the criminal case.

C. Discussion

It is not necessary for the Government to have the property subject to criminal forfeiture in its possession during the pendency of a criminal forfeiture proceeding. To the contrary, the criminal forfeiture statutes contemplate that the property will, in most cases, remain in the possession of the defendant—albeit pursuant to a pre-trial restraining order—until the court enters a preliminary order of forfeiture. *See* section 853(g) (“Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited....”). Cases where the Government takes physical possession of property subject to criminal forfeiture with a criminal seizure warrant prior to the entry of a preliminary order of forfeiture are relatively rare.

But the Government could have physical possession of the property subject to criminal forfeiture before any preliminary order of forfeiture is entered in the criminal case. Such possession may be the result of a seizure pursuant to a civil seizure warrant issued pursuant to section 981(b), a warrant of arrest in rem issued pursuant to Supplemental Rule G(3)(b)(ii), or a seizure for the purpose of civil forfeiture that was based on probable cause. It also could be the consequence of the seizure of the property for evidence—with or without a warrant—or the adoption of the property for the purpose of forfeiture from a state or local law enforcement agency. The question is whether such possession during the pendency of criminal forfeiture proceedings is proper absent the issuance of a criminal seizure warrant under section 853(f) or a pre-trial restraining order under section 853(e).

Because the Government need not have possession of the property subject to forfeiture at all during the pendency of the criminal case, the absence of a criminal seizure warrant or pre-trial restraining order is of no concern as long as the Government’s possession of the property pending trial has an independent basis. The following discussion focuses on four possible independent bases for maintaining physical possession of the property pending trial.

C.1 Property seized pursuant to a civil seizure warrant or warrant of arrest in rem

The seizure of property pursuant to a civil seizure warrant issued under section 981(b) or warrant of arrest in rem under Supplemental Rule G(3)(b)(ii) provides a valid basis for the Government’s physical possession of property pending the outcome of a criminal forfeiture proceeding. But this is so only as long as the civil forfeiture matter is pending, including if the civil proceeding is stayed during the pendency of the case. If someone files a claim in an administrative forfeiture proceeding, the Government has 90 days in which to (1) commence a civil forfeiture action, (2) commence a criminal forfeiture action, or (3) return the property. *See* 18 U.S.C. § 983(a)(3)(B). It is perfectly appropriate for the Government to file both a civil action and a criminal action within the 90-day period, or to file a civil action within such period and file a criminal action later. In such cases, the civil seizure warrant provides a valid basis for the Government’s continued possession of the property.

But section 983(a)(3)(C) provides that if “criminal forfeiture is the only forfeiture proceeding commenced by the Government, the Government’s right to continued possession of the property shall be governed by the applicable criminal forfeiture statute.” In other words, if there are parallel civil and criminal proceedings, the civil seizure warrant will provide a sufficient basis for holding the property, but if there is only a criminal case, the Government must take steps to retain possession of

the property either with a criminal seizure warrant issued pursuant to 21 U.S.C. § 853(f), or with an order issued pursuant to 21 U.S.C. § 853(e).¹⁹

The 90-day deadline provision in CAFRA, of course, only applies to cases where the property was initially seized for the purpose of “non-judicial” (i.e., administrative) forfeiture. *See* section 981(a)(1)(A). If the property was seized pursuant to a civil forfeiture seizure warrant under section 981(b) or a warrant of arrest in rem under Supplemental Rule G(3)(b)(ii), but it was not seized for the purpose of administrative forfeiture, the prescriptions found in section 983(a)(3) regarding the 90-day deadline and the need to re seize property already in Government possession do not apply. Nevertheless, even in such cases, if the Government proceeds only with a criminal forfeiture action, it may not lawfully maintain possession of the property pursuant to a civil seizure warrant alone, but must obtain either a criminal seizure warrant or a pre-trial restraining order.

C.2 Property seized without a warrant

Under section 981(b), property may be seized for civil or administrative forfeiture without a warrant if there is probable cause for the seizure and an exception to the warrant requirement applies. If those conditions are satisfied, the Government may maintain physical possession of the property pursuant to the section 981(b) seizure during the pendency of a criminal forfeiture case to the same extent as it could if the property had been seized with a warrant. That is, as long as the civil or administrative forfeiture case is ongoing, the continued possession may be based on the civil seizure. But if the civil case is terminated or not filed within the statutory deadline, the Government will have to maintain physical possession pursuant to a criminal seizure warrant or pre-trial restraining order.

C.3 Property seized for evidence

The seizure of tangible personal property for evidence provides an independent basis for the continued physical possession of property during the pendency of a criminal forfeiture proceeding as long as the evidentiary value of the property persists. Thus, if property is seized for evidence, it may be named in a criminal forfeiture proceeding and held by the Government without the need to obtain a criminal seizure warrant or pre-trial restraining order. However, if the evidentiary value of the property evaporates, the Government must obtain a seizure warrant or restraining order to maintain custody of the property for the purpose of forfeiture.²⁰ The USMS does not store property held as evidence, even when it is subject to forfeiture. Such property is retained in the custody of the seizing agency until such time as it is no longer needed for evidence.

C.4 Property obtained from the state for adoptive forfeiture

A federal seizing agency may take custody of property from a state or local law enforcement agency for the purpose of administrative forfeiture. If, in such a case, someone files a claim contesting

¹⁹ One court has held that if property is already in Government custody, the proper procedure under section 983(a)(3)(C) is not to issue a criminal seizure warrant under section 853(f), but to issue an order under section 853(e). The order need not be a restraining order or an injunction, however. Rather, the court pointed out, section 853(e) authorizes the court to issue any order that will “assure the availability of the property.” *See In Re: 2000 White Mercedes ML320*, 220 F. Supp. 2d 1322, 1326 n.5 (M.D. Fla. 2001).

²⁰ If an AUSA declines to seek a criminal seizure warrant or a section 853(e) order on the ground that this exception applies (i.e., on the ground that the property has evidentiary value but the seizing agency feels that the evidentiary value of the property is in doubt) the agency may request that the USAO provide the agency with a letter that it may use to protect itself from liability should someone later question whether there was a lawful basis for the agency’s retention of the property.

the forfeiture, the 90-day deadline provision in section 983(a)(3)(B) comes into play. Thus, the Government's obligations regarding the continued physical possession of the property during the pendency of a criminal forfeiture proceeding are the same as they would be if the property had been seized for the purpose of civil forfeiture by a federal agency in the first instance.

Alternatively, the Government may take possession of property from a state agency without any intention of proceeding with administrative or civil judicial forfeiture, but rather with the intent to seek the forfeiture of the property in a criminal case. In that instance, CAFRA does not apply, but neither does the provision in section 981(b)(2)(c) creating an exemption from the warrant requirement in adoption cases. That provision applies only to civil forfeiture proceedings. Therefore, the Government may maintain custody of the property only if it has evidentiary value, or if it obtains a criminal seizure warrant or pre-trial restraining order. In such matters, the USAO must not agree to the request by a state or local agency to institute a criminal forfeiture action until a federal agency has consented to process the asset for federal seizure.

D. Proper use of writs of entry in civil and criminal forfeiture cases

D.1 Summary

Writs of entry issued by the court and based upon a finding of probable cause may be used in both civil and criminal forfeiture cases by the United States in the following circumstances: (1) to enter onto the curtilage and inventory structures located thereon without entering those structures; (2) to enter onto private real property for the purpose of seizing personal property located thereon (such as an automobile) in plain view; and (3) to enter into the interior of a private structure subject to forfeiture to conduct an inventory limited to documenting the condition of the interior and inspecting for damage, and to conduct an appraisal. If a private structure is to be entered for the purpose of searching for and seizing (or inventorying) personal property located therein that is subject to forfeiture, it is recommended that a separate search warrant be obtained. Of course, warrantless seizures for forfeiture may be based on the automobile, plain view, exigent circumstances, and search incident exceptions to the Fourth Amendment.

D.2 Discussion

According to 18 U.S.C. § 985(b)(2), which addresses the civil forfeiture of real property, "the filing of a *lis pendens* and the execution of a writ of entry for the purpose of conducting an inspection and inventory of the property shall not be considered a seizure under this subsection." The term *writ of entry* appears nowhere else in CAFRA, nor in any other civil or criminal forfeiture statute. Section 985 provides no guidance of any kind as to the proper use and scope of a writ of entry. Answers to those questions must be gleaned from the scant case law discussing the scope of writs of entry in the context of Fourth Amendment searches and seizures.

As an initial matter, arguments can be made that the Government may seek and a district court has the authority to issue writs of entry in both civil and criminal forfeiture cases. Despite the phrase appearing only in section 985, the use of a writ of entry is not restricted to the civil forfeiture of

real property. A district court has the authority pursuant to 18 U.S.C. § 983(j)(1)²¹ and 21 U.S.C. § 853(e)(1)²² to take any action necessary to preserve the availability of property subject to forfeiture. Accordingly, the Government can make application for a writ of entry in any civil or criminal forfeiture case in order to preserve the availability of property subject to forfeiture, and the district court has the authority to issue such a writ for that purpose.

The limited case law potentially applicable to the proper use of a writ of entry is *United States v. Ladson*, 774 F.2d 436 (11th Cir. 1985) and *United States v. U.S. Currency in the amount of \$324,225.00*, 726 F. Supp. 259 (W.D. Mo. 1989). The cases suggest that writs of entry based upon a finding of probable cause by the court may be used as a basis to enter, inspect, and search the interiors of structures subject to forfeiture. In *Ladson*, a civil forfeiture action was commenced against a house pursuant to 21 U.S.C. § 881(a)(6). At the time the action was commenced, the house was rented. The Government requested and received from the district court an order entitled “seizure warrant/writ of entry,” which authorized the seizure of the real property and directed the preparation of a “... written inventory of the real estate and property thereon seized.” Upon arriving at the home, the agent executing the seizure warrant/writ of entry, over the objection of the renters, entered the house and conducted a walk-through inventory of its contents. During the inventory, drugs were found. The renters were indicted and moved to suppress the drugs. The district court suppressed the evidence. The Eleventh Circuit affirmed. 774 F.2d at 438.

The court of appeals found that nothing in the seizure warrant/writ of entry authorized the agents to enter the house without permission. It permitted nothing more than a cursory examination of the lot. “The warrant authorized seizure of... *real estate* and ordered an inventory of the property *seized*. It would have been a simple matter to inventory the *seized* property—that is, the real estate and improvements on it—from outside the house.” *Id.* at 439. Since the contents of the house were not subject to seizure, and the seizure warrant/writ of entry did not authorize an inventory of un-seized property, the agent had no legal right to enter the house. *Id.*²³

The Eleventh Circuit found that the writ of entry did not provide the Government with the legal authority to enter the house to inventory its contents or inspect for damage without a search warrant. The Fourth Amendment applies to searches for administrative purposes. 774 F.2d at 439-40. Absent exigent circumstances, the Government must obtain a warrant based upon probable cause to inspect a seized house and inventory its contents. 774 F.2d at 440.

The district court in *United States v. U.S. Currency in the amount of \$324,225.00*, 726 F. Supp. 259 (W.D. Mo. 1989), disagreed with the Eleventh Circuit’s analysis in *Ladson*. Here, a motion was filed by the Government seeking authority for the USMS to enter, inspect, inventory, and secure the defendant property.²⁴ A magistrate judge would only grant the motion if the Government agreed not to

²¹ 18 U.S.C. § 983, general rules for civil forfeiture proceedings, provides at (j)(1), “Upon application of the United States, the court may enter a restraining order or injunction, require the execution of satisfactory performance bonds, create receiverships, appoint conservators, custodians, appraisers, accountants, or trustees, or take any other action to seize, secure, maintain, or preserve the availability of property subject to civil forfeiture.”

²² 21 U.S.C. § 853, a criminal forfeiture statute located in the drug code, provides at (e)(1), “Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property [subject to criminal forfeiture] under this section.” Section 853 is applicable to the general criminal forfeiture statute found in Title 18 pursuant to 18 U.S.C. § 982(b)(2).

²³ The Eleventh Circuit did not hold that the district court could not have authorized entry into the house if presented with probable cause sufficient to support a search warrant.

²⁴ In addition to the cash, forfeiture was sought for 15 cars and a parcel of real estate.

use any contraband or evidence of a crime found inside the home against its owner. The Government appealed to the district court, which reversed the magistrate. 726 F. Supp. at 260.

The *Ladson* decision ignores the basic purpose of the plain view doctrine which is to permit law enforcement personnel to seize evidence that is in plain view *without first obtaining a search warrant*. Under *Ladson* the government cannot protect itself by inventorying and securing a house lawfully seized without surrendering its authority to seize evidence or contraband within plain view. Just as an arrestee's person may be searched and the discovered items inventoried without probable cause or search warrant...and as an impounded vehicle may be inventoried without probable cause or search warrant...the government should be permitted to conduct a limited inventory search of a building or house *lawfully seized*. The presence of law enforcement personnel inside the house for this limited purpose is undoubtedly lawful and proper. Therefore, if such an inventory should produce contraband or evidence of crime, the plain view doctrine's first requirement of a valid prior intrusion would be met. It is the Court's judgment that the government need not first agree not to use any contraband or evidence of crime that might be found during the inventory of the house.

726 F. Supp. at 261.

The district court went on to note that in cases such as the one at issue, the Government was not conducting the inventory on a whim. Such an inventory search would only be authorized after the Government made a showing of probable cause that the property is subject to forfeiture. Moreover, the Government could not do more than conduct an inventory search. If it engaged in a broader search, it would probably violate the Fourth Amendment and any evidence or contraband discovered would be subject to the exclusionary rule. "A lawful seizure only legitimizes a limited inventory search of the seized property and not a broad search for evidence or contraband." *Id.*

See also United States v. Santiago-Lugo, 904 F. Supp. 36 (D.P.R. 1995) (inventory of seized residence permitted where civil seizure warrant expressly authorizes an inventory of the contents of the residence); *United States v. One Parcel of Real Property*, 724 F. Supp. 668 (W.D. Mo. 1989) (where Government makes an initial probable cause showing that property is subject to forfeiture, basis exists for court to issue order that authorizes the Government to enter, inspect, inventory, and secure such property at the time of arrest).

Warrantless seizures for forfeiture may be based on the automobile, plain view, exigent circumstances, and search incident exceptions to the Fourth Amendment: *Florida v. White*, 526 U.S. 559 (1999) (warrantless seizure of automobile did not violate the Fourth Amendment where there was probable cause to believe the automobile was subject to forfeiture and it was found in a public place); *United States v. Gaskin*, 364 F.3d 438 (2d Cir. 2004) (applying *Florida v. White*: if agents have probable cause to believe a vehicle was used to facilitate a drug offense, and it is in a public place, they may seize it, search it, and seize currency and evidence they find therein); *United States v. \$557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66 (2d Cir. 2002) (structured money orders found in plain view by airport security could be detained temporarily as a *Terry* stop and ultimately seized on probable cause to believe the items were involved in a structuring offense; the test of whether the criminal connection was "immediately apparent" is objective—the Government does not have to establish that the seizing agent was trained to understand the significance of structured money orders); *United States v. Rankin*, 261 F.3d 735 (8th Cir. 2001) (police officer's observation of defendant conducting drug deal from his car provided probable cause for seizure of car for forfeiture and subsequent inventory search); *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) (warrantless seizure of funds captured in middle of electronic funds transfer through intermediary bank justified by exigent circumstances); *United States*

v. \$149,442.43 in U.S. Currency, 965 F.2d 868, 875-76 (10th Cir. 1992) (firearms, jewelry, and vehicles may be seized as proceeds or property used to facilitate when found incident to execution of search warrant even if items were not specifically listed in the warrant); *United States v. Berry*, 2002 WL 818872 (E.D. Pa. 2002) (under statute forfeiture law, officer was entitled to make warrantless seizure of vehicle he had seen used in drug deal and was entitled to seize gun he found in plain view); *Seaborn v. Thompson*, 2002 WL 737654 (M.D.N.C. 2002) (following *Florida v. White*: state police may seize automobile for forfeiture under state law without a warrant if they have probable cause); *United States v. Wright*, 171 F. Supp. 2d 1195 (D. Kan. 2001) (no warrant required for seizure of vehicle from public place where officer has probable cause to believe vehicle was previously used to transport drugs; lawful inventory search may follow); *United States v. Warren*, 181 F. Supp. 2d 1232 (D. Kan. 2001) (items discovered during execution of search warrant, but not named in warrant, may be seized if there is probable cause to believe they are subject to forfeiture under state law); *United States v. Medina*, 301 F. Supp. 2d 322 (S.D.N.Y. 2004) (cash found in plain view in closet during a “protective sweep” of apartment to make sure no one else is present during criminal suspect’s arrest may be seized if there is probable cause); *United States v. Washington*, 1997 WL 198046 (D. Kan. 1997) (items found incident to execution of search warrant may be seized for forfeiture under section 881(b)(1)), *aff’d*, 162 F.3d 1175 (10th Cir. 1998); *but see United States v. One 1974 Learjet*, 191 F.3d 668, 672 n.2 (6th Cir. 1999) (reserving decision on whether a warrant is required to seize property for forfeiture even if the Government has probable cause); *United States v. Brookins*, 228 F. Supp. 2d 732 (E.D. Va. 2002) (*Florida v. White* permits warrantless seizure based on probable cause only when the vehicle is in a public place, not when it is on a private driveway).

D.3 Conclusion

In view of the limited and somewhat conflicting case law on this obscure writ, it is the opinion of AFMLS that writs of entry issued by the court and based upon a finding of probable cause may be used in both civil and criminal forfeiture cases by the United States in the following circumstances: (1) to enter onto the curtilage and inventory structures located thereon without entering those structures; (2) to enter onto private real property for the purpose of seizing personal property located thereon (such as an automobile) in plain view; and (3) to enter into the interior of a private structure subject to forfeiture to conduct an inventory limited to documenting the condition of the interior of the structure, inspecting for damage, and conducting an appraisal. If a private structure is to be entered for the purpose of searching for and seizing (or inventorying) personal property located therein that is subject to forfeiture, it is recommended that a separate search warrant be obtained in conjunction with or in lieu of a writ of entry. In any case where a writ of entry is being sought, the application should be accompanied by a detailed agent affidavit setting forth the facts supporting a conclusion that the Government has probable cause to believe that (1) the property being searched for, seized, and/or inventoried is subject to forfeiture; and (2) that the said property is located at or in the place to be searched.

IV. Contaminated Real Property

A. Background

Certain statutory provisions may impose liability on the United States in connection with contaminated real property that it owns—including ownership obtained through forfeiture. Moreover, even when liability is not imposed on the United States under these statutory provisions, there may be

practical impediments to the sale or transfer of such properties by the United States after forfeiture. Consequentially, caution must be exercised in targeting real property for forfeiture when there are indications that the real property may be contaminated.

The most prominent of these statutory provisions include the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq. The liability provisions of 42 U.S.C. § 9607 are imposed upon the United States by 42 U.S.C. § 9620(a). Section 9620(h) sets forth notice and warranting requirements that apply whenever any agency, department, or instrumentality of the United States enters into a contract for the sale or other transfer of real property that is owned by the United States and on which any hazardous substance²⁵ either (1) has been stored for more than one year, (2) is known to have been released, or (3) is known to have been disposed of.

The Residential Lead-Based Paint Hazard Reduction Act of 1992 includes provisions at 42 U.S.C. § 4852(d) which require disclosure of information concerning potential lead-based paint contamination upon the transfer of residential property.²⁶ Further, the United States may be required to undertake certain abatement actions of lead-based paint contamination for forfeited property constructed prior to 1960.²⁷ Forfeited property constructed during or after 1960 but before 1978²⁸ may be marketed and sold after complying with certain risk assessment and lead-based paint inspection. If the sale is completed within 270 days of the final order of forfeiture, the Government is exempted from these abatement, risk assessment, and inspection requirements.²⁹

In addition to federal statutory provisions, state environmental laws must be considered when targeting contaminated real property for forfeiture.³⁰ Even when federal statutes may allow the United States to transfer contaminated real property without continuing federal liability for cleanup, applicable state law may continue to impose liability or may make the real property unmarketable in practical terms.

B. Policy

It is the policy of the Department of Justice that real property that is contaminated or potentially contaminated with hazardous substances may in the exercise of discretion be subject to forfeiture only upon determination by the U.S. Attorney, for the district where the property is located, in consultation with the seizing agency and the USMS, that such action is fiscally sound or necessary to advance a law enforcement purpose. If the U.S. Attorney chooses to delegate this authority to an AUSA, a provision must be made for review by a supervisor. As part of the consultation with the seizing agency and the USMS, due consideration must be given to the disposal alternatives that may be available after forfeiture, and the impact of any cleanup costs to the AFF. Furthermore, such real property that is forfeited will only be transferred or sold with notice of the potential or actual

²⁵ The term *hazardous substance* means that group of substances defined as hazardous under CERCLA (42 U.S.C. § 9601(14)) and that appear at 40 C.F.R. § 302.4. *See also* 40 C.F.R. §§ 261 and 373. The requirements for reporting hazardous substances in connection with the sale or transfer of federal property are in part 373.

²⁶ The regulations implementing these disclosure requirement are found at 24 C.F.R. § 35.88. Certification and acknowledgment of disclosure requirements are found at 24 C.F.R. § 35.92.

²⁷ 24 C.F.R. § 35.210.

²⁸ 24 C.F.R. § 35.215. In the case of jurisdictions that banned the sale or residential use of lead-based paint prior to 1978, an earlier date may be applicable. 24 C.F.R. § 35.115(a)(1).

²⁹ 24 C.F.R. § 35.115(a)(10).

³⁰ Section 9620(a)(4) provides that state law concerning removal and remedial action shall apply to such actions facilities owned by the United States, including property transferred by federal agencies. Section 9620(h)(3)(C).

contamination. Notice must be based on information that is available from a complete search of agency files.³¹ This notice must be included in the contract of sale and the deed.

This policy is applicable regardless of the type or source of the hazardous substance(s). This policy is applicable to all cases referred to the Department of Justice by any agency of the United States.

Forfeited real property that is marketable but is contaminated, or potentially contaminated, with hazardous substances due to activities of a prior owner may be transferred or sold as is and an environmental assessment and/or remediation of the contamination need not be undertaken.

Whenever possible, the USMS will obtain a commitment from the buyer to clean up the property as a part of the contract of sale.

However, the United States may bear additional responsibility and liability if the real property becomes contaminated with a hazardous substance after the United States becomes the owner. This situation normally will arise when the United States operates a business or activity on the property that results in the storage, release, or disposal of hazardous substances (e.g., gasoline stations, metal plating shops, dry cleaners, printers, etc.). Under this circumstance, the United States is responsible for (1) all costs of hazardous substances removal and/or remedial action,³² (2) providing notice of the hazardous substance to a subsequent transferee or purchaser,³³ and (3) a warranting covenant to a subsequent transferee or purchaser. Because of the potential resulting liability and expense, the USMS' AFD shall approve the operation of such a business or activity only in unusual circumstances.

This policy envisions U.S. Attorneys exercising discretion in undertaking forfeiture action against real property that is contaminated, where the use of the property indicates contamination or where there is the potential of contamination, with hazardous substances. If such circumstances are disclosed within the period of time that the forfeiture action is being pursued, the U.S. Attorney must reevaluate the decision to continue the forfeiture. Such properties must not be forfeited unless the defendant's net equity in the property clearly exceeds the estimated cost of cleanup. *Furthermore, such properties are not to be forfeited when there is reason to believe that the property is substantially contaminated with hazardous substances and that such contamination will render the property unmarketable.* Cleanup costs can be considerable, particularly when the water table is involved. In making this determination, the USMS may order an environmental assessment that will be paid from the AFF.

If at any point the U.S. Attorney elects, in the exercise of discretion, not to proceed with the forfeiture because significant contamination renders the property unmarketable, the U.S. Attorney must consider the following alternatives:

- (1) the filing of a release of *lis pendens* (assuming a *lis pendens* had been filed) containing notice of the reason (significant contamination) for dismissal of the forfeiture action;

³¹ 42 U.S.C. § 9620(h)(3); 40 C.F.R. § 373.1. It is envisioned that this search will involve the investigative agency's case files(s) relating to the real property. Additionally, the search must include any documentation generated from an environmental assessment or the removal of hazardous substances from the real property.

³² The Environmental Protection Agency's funds, to include the Superfund, are generally not available for remedial actions on federally owned property. *See* 42 U.S.C. § 9111(e)(3).

³³ The covenant must warrant that (1) all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer and (2) any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States. *See* 42 U.S.C. § 9620(h)(3)(B).

- (2) the filing of some other document in the county deed records containing notice of the significant contamination (if such filing is permitted under the law);
- (3) notification of a federal, state, or local environmental agency of the significant contamination for purposes of appropriate enforcement action (federal, state, or local law may require mandatory notification);
- (4) notification of any lienholders of the significant contamination for such action as they may want to take; and
- (5) consideration of prosecution, civilly or criminally, for violations of the environmental laws by the private owner (the USAO should contact ENRD).

Not all of these alternatives are mandatory. Ultimately, it is within the discretion of the U.S. Attorney to decide how best to proceed when an election not to proceed with forfeiture is made.

V. Financial Instruments

The following describes procedures and responsibilities for handling financial instruments seized for forfeiture. Consultation with the USAO is recommended.

A. Postal money orders

A.1 Seizing agency

Immediately following seizure, the seizing agency should send (1) the serial numbers, (2) the amount of each money order, and (3) a statement that the Government has received the money orders and is entitled to them under forfeiture laws to the following address:

US Postal Inspection Service
Criminal Investigations Group
National Money Order Coordinator
475 L'Enfant Plaza SW, Room 3800
Washington, DC 20260-3800

Upon receipt of the above information the U.S. Postal Service (USPS) will place the respective money orders “on hold” pending further instructions. The seizing agency should also provide the USMS with a copy of this letter at the time the money orders are transferred to the USMS for custody.

A.2 The USMS

Upon forfeiture of the money orders, the USMS will contact the USPS and request the original hold to be removed. Once removed, the USMS will coordinate with the USPS to have the forfeited money orders processed for payment to the USMS.

B. Personal and cashier's checks

B.1 Seizing agency

Immediately following seizure, the seizing agency, in conjunction with the USAO, should

- (1) obtain a restraining order or seizure warrant, under the applicable criminal or civil forfeiture statute, directing the financial institution upon which the check is drawn to either:
 - (a) take necessary steps to maintain funds sufficient to cover the check, in the case of a restraining order; or
 - (b) release funds in the amount of the check, in the case of a seizure warrant;
- (3) serve the restraining order or seizure warrant on the financial institution; and
- (4) provide a copy of the restraining order or seizure warrant to the USMS at the time the check is transferred for custody. In the event that a seizure warrant is obtained, the check should be voided and returned to the bank when it is no longer needed as evidence.

B.2 The USMS

The USMS will accept custody of all checks for which the investigative agency has contacted the bank from which they were drawn and negotiate the checks after receipt of a declaration or order of forfeiture in accordance with established procedures.

C. Certificates of deposit

C.1 Seizing agency

Immediately following seizure or restraint, the seizing agency should (1) notify the bank that issued the certificate of deposit that it has been seized or restrained for forfeiture and (2) instruct the bank officials to take whatever steps are necessary to freeze the funds covered by the certificate so the certificate of deposit will be negotiable by the USMS after forfeiture.

C.2 The USMS

The USMS will take appropriate action, in accordance with established procedures, to liquidate the certificate of deposit after forfeiture.

D. Traveler's checks

D.1 Seizing agency

Immediately following seizure, the seizing agency should (1) notify the company issuing the checks that they have been seized for forfeiture and (2) determine what procedures will be required in order to redeem the checks.

If they can be redeemed prior to forfeiture, (1) take appropriate steps to liquidate the checks and (2) have the issuing company issue a cashier's check to the USMS.

If liquidation cannot occur until after forfeiture, turn the checks over to the USMS with verification that the issuing company has been notified.

D.2 The USMS

The USMS will accept custody of all traveler's checks that cannot be liquidated until after forfeiture. Upon receipt of a declaration of forfeiture, the USMS will liquidate the asset in accordance with established procedures.

E. Stocks, bonds, and brokerage and other investment accounts

E.1 Seizing agency

Immediately following seizure or restraint, the seizing agency should contact a certified stock broker (state and national) to establish the fair market value of the asset and determine how the instrument is traded. The seizing agency should contact the USMS' Complex Assets Unit if the stock is that of a privately-held company.

Securities targeted for forfeiture that are in a brokerage account will usually be seized or restrained in place. Any restraining order may provide that the funds will continue to be invested as they were on the date of restraint, unless such investment is modified by order of the court. Upon receipt of an interlocutory order/ final order of forfeiture, the USMS will instruct the broker to liquidate the account. The net proceeds after commission are deposited in the AFF. Pursuant to court order, brokerage accounts may be held in a different manner in order to preserve the value of the account.

When stocks or bond certificates are seized, the USMS will hold the certificates pending an interlocutory order/final order of forfeiture, upon receipt the USMS' Complex Assets Unit will oversee the liquidation and deposit of proceeds into the AFF.

The USMS will not accept custody of any financial instrument with a fair market value equal to \$0, or any stocks or bonds that were issued by a "shell corporation" and are not traded on the open market. Consult with USMS to determine the best course of action when seeking to seize the stocks or bonds of privately or closely held corporations.

E.2 The USMS

The USMS will accept custody of all stocks and bonds for which the seizing agency can document a significant worth. As a general rule, the USMS will coordinate with the USAO to try to liquidate stocks and bonds through interlocutory sale whenever possible.

F. U.S. savings bonds

F.1 Seizing agency

Immediately following seizure, the seizing agency should notify the Department of the Treasury, by certified letter, listing the following:

- (1) serial numbers;
- (2) bond denominations;
- (3) to whom payable; and

- (4) the reason for which they were seized.

The seizing agency should send the above information to the following address:

Bureau of Public Debt Savings Bond Division
Parkersburg, WV 26106

The seizing agency should provide the USMS with a copy of this letter at the time the savings bonds are transferred for custody.

F.2 The USMS

The USMS will accept custody of all savings bonds, maintain such bonds until forfeiture, and dispose of such bonds in accordance with established procedures.

VI. Seized Cash Management

The security, budgetary, and accounting problems caused by retention of large amounts of cash historically has caused great concern within the Department of Justice and Congress. In the past, agencies participating in the Department of Justice's Asset Forfeiture Program have held tens of thousands of dollars in office safes and other locations throughout the country. This raises both financial management and internal control issues. The Department of Justice must report annually to Congress on the amount of seized cash not on deposit.

The Attorney General has established the following policy on the handling of seized cash:³⁴

Seized cash, except where it is to be used as evidence, is to be deposited promptly in the Seized Asset Deposit Fund pending forfeiture. The Chief, AFMLS, may grant exceptions to this policy in extraordinary circumstances. Transfer of cash to the U.S. marshal should occur within 60 days of seizure or 10 days of indictment.

This policy applies to all cash seized for purposes of forfeiture.³⁵ Therefore, all currency seized that is subject to criminal or civil forfeiture must be delivered to the USMS for deposit in the USMS Seized Asset Deposit Fund either within 60 days after seizure or 10 days after indictment, whichever occurs first.³⁶ Photographs or videotapes of the seized cash should be taken for use in court as evidence.

If the amount of seized cash desired to be retained for evidentiary purposes is less than \$5,000, permission need not be sought from AFMLS for an exception; but any exception must be granted at a supervisory level within a USAO using the criteria below.

If the amount of seized cash to be retained for evidentiary purposes is \$5,000 or greater, the request for an exemption must be forwarded to AFMLS.³⁷ The request should include a brief statement of the factors warranting its retention and the name, position, and phone number of the individual to contact regarding the request.

³⁴ *The Attorney General's Guidelines on Seized and Forfeited Property* (revised Nov. 2005), section VII(1).

³⁵ See *The Department of the Treasury's Guidelines for Seized and Forfeited Property*, Directive No. 4 "Seized Cash Management Policy" for cash seized by a Treasury member agency.

³⁶ This policy does not apply to the recovery of buy money advanced from appropriated funds. To the extent practical, negotiable instruments and foreign currency should be converted and deposited.

³⁷ The criteria and procedure for obtaining exemptions remains the same for cash retained by other agencies participating in the Asset Forfeiture Program.

Limited exceptions to this directive are very rare. Exceptions, such as extensions of applicable time limits, will be granted, on an interim basis, only with the express written permission of the Chief of AFMLS.³⁸ Extensions of applicable time limits may be further extended upon request, but must be deposited in the SADP if subsequent requests are denied. Retention of currency will be permitted when it serves a significant independent, tangible, evidentiary purpose due to, for example, the presence of fingerprints, packaging in an incriminating fashion, or the existence of a traceable amount of narcotic residue on the bills.³⁹ If only a portion of the seized cash has evidentiary value, only that portion with evidentiary value should be retained. The balance should be deposited in accordance with Department of Justice policy.

The commingling of cash seized by the Government under section 881(a)(6) will not deprive the court of jurisdiction over the res. Unlike other assets seized by the Government (e.g., real property, conveyances), cash is a fungible item. Its character is not changed merely by depositing it with other cash. While it is true that the jurisdiction of the court is derived entirely from its control over the defendant res, court jurisdiction does not depend upon control over specific cash. As stated in *United States v. \$57,480.05 United States Currency and Other Coins and \$10,575.00 United States Currency*, 722 F.2d 1457 (9th Cir. 1984), “Jurisdiction did not depend upon control over specific bits of currency. The bank credit of fungible dollars constituted an appropriate substitute for the original res.”

It has never been a requirement that the Government segregate specific cash seized for forfeiture in one case from that seized for forfeiture in another. Commingling of such assets has been the rule and not the exception.⁴⁰

VII. General Adoption Policy and Procedure

A. Adoptive seizures are encouraged

Forfeiture is one of the most effective weapons in the law enforcement arsenal and its use should be encouraged. In many areas of the nation, effective use of forfeiture requires a willingness on the part of federal law enforcement agencies to adopt state and local seizures for federal forfeiture whenever appropriate. Department of Justice personnel in the field should adopt state and local seizures in order to immobilize criminal enterprises and to enhance cooperation among federal, state, and local agencies. This does not preclude application of established monetary thresholds nor relieve approving officials of the duty to verify that the property presented for adoption is subject to seizure and forfeiture under federal law.

The policies and procedures in this section are intended to ensure consistent review and handling of state and local seizures presented for federal adoption. This section only applies to property seized exclusively through the efforts of state and local agencies where those efforts also establish a basis for federal forfeiture.⁴¹ Where a federal law enforcement agency makes a material pre-seizure contribution to the investigation leading to a state or local seizure or post-seizure contribution

³⁸ Requests for an exemption should be filed by the USAO or Criminal Division section responsible for prosecuting, or reviewing for prosecution, a particular case.

³⁹ The authority to approve exceptions to the Department of Justice cash management policy requiring that all seized cash, except where it is to be used as evidence, is to be deposited promptly into the Seized Asset Deposit Fund as set forth in section VII(1) of *The Attorney General's Guidelines on Seized and Forfeited Property* (revised Nov. 2005) was delegated by the Assistant Attorney General, Criminal Division, to the Chief, AFMLS, Criminal Division, on December 13, 1991.

⁴⁰ See *American Bank of Wage Claims v. Registry of the District Court of Guam*, 431 F.2d 1215 (9th Cir. 1970).

⁴¹ This section does not apply to property initially seized by other federal agencies.

establishing probable cause for the forfeiture under federal law, this section does not apply. Such seizures will be deemed the result of a joint federal investigation.

B. Federal adoption request

All state and local seizures presented for adoption must be reported on a form entitled *Request for Adoption of State or Local Seizure*.⁴² The form should be completed by the requesting state or local agency, but federal personnel may, in their discretion, complete the form for the requesting state or local agency. Information concerning any state forfeiture proceedings instituted against the property must be detailed in the request for adoption form. A federal agency should not adopt a seizure while the property remains subject to the jurisdiction of a state court. The state or local agency also may be required to complete the federal agency's standard seizure form as part of the adoption request. All information provided must be complete and accurate. An estimate of fair market value must be provided for each item of seized property presented for adoption and any liens and lienholders must be identified. Copies of any investigative reports and of any affidavits in support of warrants pertinent to the seizure must be attached for review.⁴³

C. Federal law enforcement agency review

The adopting federal agency must consider adoption requests promptly. Except in exceptional circumstances, the request for adoption must be approved prior to the transfer of the property to federal custody.

Only an attorney outside the chain-of-command of operational officials (e.g., the agency's office of chief counsel or other legal unit) may approve a request for adoption unless:

- (1) the seizure was based on a judicial seizure warrant; or
- (2) an arrest was made in connection with the seizure; or
- (3) drugs or other contraband were seized from the person from whom the property was seized.

Federal law enforcement agencies may expand the circumstances requiring attorney approval. Any attorney review shall verify that:

- (1) the property is subject to federal forfeiture;
- (2) there is probable cause to support the seizure;
- (3) the property is not subject to the jurisdiction of a state court; and
- (4) there is no other legal impediment to a successful forfeiture action.

Federal law enforcement agencies will normally secure attorney review through their own offices of chief counsel or other legal unit but may, in their discretion, request that an AUSA conduct this review. Any further review processes established in the future for federal seizures will also

⁴² The adoption request form is available at <http://www.justice.gov/criminal/afmls/forms/pdf/request-for-adoption-form.pdf>.

⁴³ State or local agencies may redact from investigative reports information which may disclose the identity of a confidential informant. However, disclosure ultimately may be required if information provided by the informant is needed to establish the forfeitability of the property in a subsequent judicial forfeiture proceeding.

apply to adoptive seizures. Pre-seizure planning is an essential part of the review process. Property management issues must be addressed in consultation with the USMS prior to an adoption.

D. Minimum monetary thresholds

Generally, a state or local seizure may not be approved for adoption unless the equity in the property exceeds the amounts listed in section I.D.1.

E. Forfeitures generally follow the prosecution

As discussed in Chapter 2, Section VI of this *Manual*, when property is seized as part of an ongoing federal criminal investigation and the criminal defendants are being prosecuted in federal court, the forfeiture action, as a general rule, should be commenced administratively by a federal agency or pursued in federal court, regardless of who made the seizure. Conversely, when a state or local agency has seized property as part of an ongoing state criminal investigation and the criminal defendants are being prosecuted in state court, any forfeiture action should generally be pursued in state court assuming that state law authorizes the forfeiture.

F. 30-day rule for presentation for federal adoption

A federal law enforcement agency may be required to commence administrative forfeiture proceedings by sending written notice “not more than 90 days after the date of seizure by the state or local law enforcement agency.”⁴⁴ In order to allow ample time for federal agencies to process adoptive seizures, state and local agencies must request federal adoption within 30 calendar days of seizure. Any waiver of the 30-day rule must be approved in writing by a supervisory-level official of the adopting agency where the state or local agency requesting adoption demonstrates the existence of circumstances justifying the delay.

G. Direct adoption by the U.S. Attorney

A U.S. Attorney may recommend in writing that a federal law enforcement agency with appropriate jurisdiction adopt a particular state or local seizure or category of seizures for federal forfeiture prior to requesting approval for a direct adoption by the USAO. If the federal agency declines to adopt the seizure, the U.S. Attorney may refer the matter to the AFMLS. AFMLS may authorize direct adoption of the seizure or category of seizures by the U.S. Attorney for judicial forfeiture under federal law where a compelling law enforcement purpose justifies such action.

In order to receive approval for a proposed direct adoption, the U.S. Attorney must send a written request to AFMLS. That request for direct adoption approval must include (1) a written summary of the investigation, (2) a written declination from the federal seizing agency, (3) a statement of whether the declining federal seizing agency objects to the proposed direct adoption, (4) the current custody status of the asset, and (5) a justification as to why the proposed direct adoption would serve a compelling law enforcement purpose. AFMLS will obtain input from the headquarters office of the seizing agency that declined to adopt the matter regarding the proposed direct adoption. All requests for direct adoption approval must be submitted to AFMLS in advance of listing the property in an indictment or forfeiture complaint.

⁴⁴ See 18 U.S.C. § 983(a)(1)(A)(iv).

AFMLS shall notify the U.S. Attorney and the U.S. Marshal in that district when direct adoption is authorized, at which time the USMS will create a CATS ID with the agency code of STL. Where the property being adopted for federal forfeiture is a seized firearm, the state or local law enforcement agency which seized or is holding the firearm pending federal forfeiture shall perform an NCIC check and ballistic and forensic tests on the seized firearm before it is taken or transferred into federal custody.

Equitable sharing on assets approved for direct adoption shall be conducted in accordance with Chapter 6 of this *Manual*. In direct adoption cases, the U.S. Attorney is responsible for completing sections I, II, and III of any DAG-72 forms recommending sharing with the state or local agencies involved in the law enforcement effort. The U.S. Marshal will enter any DAG-71 forms and sections I and II of the DAG-72 into CATS, and the U.S. Attorney will enter section III of the DAG-72 into CATS.

H. Retention of custody by state or local agency during federal forfeiture proceedings

To minimize storage and management costs to the Department of Justice, the state or local agency requesting adoption of a conveyance should, at the discretion of the USMS, serve as the substitute custodian of the property pending forfeiture. The USMS may authorize a state or local law enforcement agency requesting adoption of other personal property, except cash and other financial instruments, to serve as the substitute custodian where appropriate. Use or disposition of the property during this period by state or local law enforcement officials or others is strictly prohibited.⁴⁵

I. Real property

Following consultation with the USMS and concurrence by the USAO, a federal law enforcement agency may approve a request for federal adoption of real property seized by a state or local agency. The requirements outlined in 18 U.S.C. § 985 govern the federal seizure and civil forfeiture of real property.

J. Use of anticipatory seizure warrants

If a state or local law enforcement agency commences a forfeiture action under state law, no federal forfeiture action may be commenced as long as the state court has in rem or quasi-in-rem jurisdiction over the subject property. If, however, the state or local authorities determine, for whatever reason, that the state action will be terminated before it is completed, and that the property will accordingly be released, or a federal seizing agency otherwise learns that the state court is about to order the release of property that is federally forfeitable, a federal agency may arrange to seize the property by obtaining an anticipatory seizure warrant from a federal judge or magistrate. The anticipatory seizure

⁴⁵ See also Chap. 5, Sec. II.C of this *Manual*.

warrant must provide that it will be executed only after the state court has relinquished control over the property.⁴⁶

For purposes of the notice requirements in section 983(a)(1), property seized pursuant to an anticipatory seizure warrant in these circumstances is considered the subject of a federal seizure such that the period for sending notice of the forfeiture action is 60 days, commencing on the date when the anticipatory seizure warrant is executed.

K. Concurrent jurisdiction

As noted above, a federal agency may not approve the adoption of a seizure while the property remains subject to the in rem or quasi-in-rem jurisdiction of a state court. Depending on state law, a state court may be deemed to acquire jurisdiction over property seized by a state or local agency in a variety of ways: where a state commences forfeiture proceedings against the seized property, where a party files an action in state court seeking the return of the property, where a state or local agency seizes the property pursuant to a state search warrant or seizure warrant, or even where a state or local law enforcement officer simply seizes the property in the absence of state process. As a matter of comity, the court first assuming in rem jurisdiction over the property retains jurisdiction to the exclusion of all others. Consequently, if a state court has in rem jurisdiction over property, the state court must relinquish jurisdiction before any request for adoption may be approved. In these situations, the agency requesting adoption, with the assistance of the appropriate state or local prosecutorial office, may be required to obtain a state court turnover order relinquishing jurisdiction and authorizing the transfer of the property to a federal law enforcement agency for the purpose of federal forfeiture. Where a state search warrant or seizure warrant contains this authorization, or a state statute or controlling case law authorizes release of seized property for federal forfeiture, a subsequent turnover order is unnecessary.

The turnover order must be obtained from the state court with jurisdiction over the seized property (i.e., the state court that issued the warrant allowing the seizure or before which the state forfeiture proceedings have been commenced). The USAO should not seek such orders in state court, but may assist its state counterparts in doing so. Failure to obtain a turnover order may make it impossible for a federal court to take jurisdiction over the seized property in subsequent judicial forfeiture proceedings. In some cases, this may result in the dismissal or voiding of federal judicial forfeiture proceedings and the return of the property to the person from whom it was originally seized.

⁴⁶ See *United States v. \$174,206.00 in U.S. Currency*, 320 F.3d 658 (6th Cir. 2003) (concurrent jurisdiction doctrine does not bar federal court from exercising in rem jurisdiction over property that state court has released to the claimants after state prosecutors failed to commence a forfeiture action within the deadlines specified by state law); *United States v. \$490,920 in U.S. Currency*, 911 F. Supp. 720 (S.D.N.Y. 1996) (district court cannot exercise in rem jurisdiction until state court relinquishes it), *Motion for reconsideration granted*, 937 F. Supp. 249, 252-53 (S.D.N.Y. 1996) (court may grant anticipatory seizure warrant so Government can seize property as soon as state court relinquishes it); *United States v. One Parcel Property Lot 85*, 100 F.3d 740, 743 (10th Cir. 1996) (initiation of federal civil forfeiture action does not violate concurrent jurisdiction rule as long as property is not actually seized until after state action is dismissed); *United States v. One 1987 Jeep Wrangler*, 972 F.2d 472, 478-479 (2d Cir. 1992) (federal court may exercise jurisdiction over property under federal forfeiture law once it is released by state court and resealed by federal authorities; state court's order releasing property has no effect on federal forfeiture); *United States v. One Black 1999 Ford Crown Victoria Lx*, 118 F. Supp. 2d 115, 118-19 (D. Mass. 2000) (because only one court may exercise in rem jurisdiction over property at a time, federal court may not exercise jurisdiction while state forfeiture action is pending; but once state court rules that property must be released and the order is obeyed, state jurisdiction evaporates and property may be resealed and made subject to forfeiture under federal law; following *Jeep Wrangler*); *United States v. \$3,000,000 Obligation of Qatar National Bank*, 810 F. Supp. 116, 117-19 (S.D.N.Y. 1993) (federal court, though "second in time," may proceed to judgment, assert a lien that will result in seizure of the asset only upon release from state jurisdiction, but stay execution of the judgment until federal jurisdiction is perfected).

Chapter 2: Administrative and Judicial Forfeiture

I. Interplay of Administrative and Civil Judicial Forfeiture

A. Preference for administrative forfeiture

Before 1990, virtually all forfeitures of properties valued at more than \$100,000 were conducted judicially. In 1990, however, the law was amended to permit the administrative forfeiture of cash and monetary instruments, without regard to value, and of other property up to a value of \$500,000. *See* 19 U.S.C. § 1607.

The legislative history of this law makes clear that Congress sought to increase the speed and efficiency of uncontested forfeiture actions and had confidence in the notice and other safeguards built into administrative forfeiture laws. Moreover, the due process protections enacted as part of the Civil Asset Forfeiture Reform Act (CAFRA) of 2000 ensure that the administrative forfeiture laws operate fairly. Accordingly, there is a preference for doing forfeitures administratively where it is possible to do so.

In general, properties subject to administrative forfeiture¹ must be forfeited administratively, unless one of the following exceptions applies:

- (1) Where several items of personal property (other than monetary instruments) are subject to civil forfeiture under the same statutory authority and on the same factual basis, and they have a common owner and a combined appraised value in excess of \$500,000, the property should be forfeited judicially in a single action.
- (2) Where the items subject to forfeiture include some that can be forfeited administratively and others that must be forfeited judicially, the forfeitures may be combined in a single judicial action.
- (3) When pursuing administrative forfeiture might create the appearance that the Government is circumventing the time limits on administrative forfeiture set forth in 18 U.S.C. § 983(a), the forfeiture should be done judicially as explained in section I.D.
- (4) When the U.S. Attorney and the seizing agency agree that the forfeiture should proceed judicially in the first instance, administrative forfeiture is unnecessary.
- (5) When, as explained in section II.B, the U.S. Attorney requests that the seizing agency suspend the administrative forfeiture to allow the forfeiture to be handled criminally, and the seizing agency agrees to do so, the forfeitures may be pursued exclusively as part of the criminal case.

¹ In general, all property subject to forfeiture may be forfeited administratively except (1) real property (*see* 18 U.S.C. § 985); (2) personal property having a value of more than \$500,000, except as noted in 19 U.S.C. § 1607(a); and (3) property forfeitable under a statute that does not incorporate the Customs laws (*see, e.g.,* 18 U.S.C. § 492, relating to counterfeiting).

B. Administrative forfeiture of bank accounts

Section 1607(a)(4) of Title 19 states that “monetary instruments” may be administratively forfeited without regard to dollar value. This is an exception to the \$500,000 cap on the administrative forfeiture of personal property set forth in section 1607(a)(1), but it does not apply to funds in a bank account.

The term *monetary instrument* is defined in 31 U.S.C. § 5312(a)(3) to mean currency, traveler’s checks, various forms of bearer paper, and “similar material.” Neither this statutory definition nor the parallel definition in the applicable regulations encompasses the funds in a bank account. Moreover, the legislative history of 31 U.S.C. § 5312(a)(3) indicates that Congress intended the term *monetary instrument* to apply only to highly liquid assets.² Consequently, funds in a bank account may not be considered monetary instruments for the purposes of the exception to the \$500,000 cap on administrative forfeitures.³ Seizing agencies may not invoke the exception to the \$500,000 cap in 19 U.S.C. § 1607(a)(4) by waiting until funds seized from a bank account are converted to a monetary instrument such as a check, and then forfeiting the check administratively. If funds in a bank account in excess of \$500,000 are seized from a bank, they must be forfeited judicially regardless of the form they take when received from the bank by the seizing agency.

Funds that were withdrawn from a bank account by the account holder and converted to currency or a monetary instrument before the seizure by a law enforcement agency took place, however, fall within the exception in section 1607(a)(4) and thus may be forfeited administratively regardless of value. Moreover, funds in a bank account of a value of \$500,000 or less may be administratively forfeited pursuant to section 1607(a)(1), subject to the policy on handling forfeitures judicially if the aggregate value of two or more assets exceeds \$500,000, as discussed in section I.A.

C. Conversion of administrative forfeitures covered by the “Customs carve-out” to judicial forfeitures subject to 18 U.S.C. § 983⁴

There are times when an administrative forfeiture is commenced under Title 19,⁵ but the ensuing judicial forfeiture is brought under another statute. Title 19 forfeitures are exempt from the provisions of section 983, whereas most other forfeitures are not. This section discusses what action the United States should take when it converts an administrative forfeiture action under Title 19 to a civil judicial action brought under a non-Title 19 statute that is not exempt from the requirements of section 983.

C.1 Summary

The reforms enacted in 18 U.S.C. § 983 under CAFRA are applicable to all civil forfeitures taken under any provision of federal law except for those specifically exempted by 18 U.S.C. § 983(i). Forfeitures to which the provisions of section 983 are not applicable include, inter alia, forfeitures under Title 19 that are enforced by Customs and Border Protection (CBP) and U.S. Immigration and

² H. Rep. No. 91-975, 91st Cong. 1, 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News 4407. “It is not the intention of your committee, however, that this broadened authority be expanded any further than necessary to cover those types of bearer instruments which may substitute for currency.”

³ See also 31 C.F.R. 1010.100(dd) (eff. Mar. 1, 2011) (formerly § 103.11(u)) (defining monetary instruments).

⁴ The term “Customs carve-out” refers to certain civil forfeiture statutes, including those for which Title 19 provides the substantive basis for forfeiture, that are expressly exempt from the provisions of 18 U.S.C. § 983, enacted as part of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) (effective August 23, 2000). See 18 U.S.C. § 983(i).

⁵ The reference to forfeitures commenced under Title 19 is to cases in which Title 19 provides the substantive basis for the forfeiture, not cases in which the procedures in Title 19 are incorporated into other forfeiture statutes. See, e.g., 18 U.S.C. § 981(d).

Customs Enforcement–Homeland Security Investigations (ICE–HSI) (formerly components of the U.S. Customs Service). In instances where CBP (on its own, or on behalf of ICE–HSI) commences an administrative forfeiture action under Title 19, but the U.S. Attorney subsequently files a civil judicial forfeiture action under a non-Title 19 statute (e.g., 21 U.S.C. § 881, which is not exempt from section 983), the U.S. Attorney should comply with all CAFRA deadlines, including the 90-day filing deadline under section 983(a)(3), and CBP should return any cost bond that may have been filed.

C.2 Discussion

CAFRA governs administrative and judicial forfeitures under all civil forfeiture provisions of federal law, except for those explicitly exempted by section 983(i). Thus, the procedures governing administrative and civil judicial forfeiture in section 983 apply to nearly all federal civil forfeiture statutes, including some of the most obscure. The only forfeitures to which section 983 does not apply are those specified in section 983(i), which include, *inter alia*, all forfeitures under Title 19, all forfeitures under Title 26 (including forfeitures of firearms under the National Firearms Act), and certain forfeitures under other statutes enforced by CBP and ICE–HSI, or other federal agencies.⁶ In those cases, the Customs laws remain in effect as if section 983 had not been enacted. Because section 983(i) exempts many forfeiture provisions enforced by CBP and ICE–HSI from application of the other provisions of section 983, it is generally referred to as the “Customs carve-out” provision.⁷

Given the Customs carve-out in section 983, a potential problem arises when a CBP or ICE–HSI officer seizes property pursuant to Title 19 authority, initiates an administrative forfeiture action, and—as CBP is required to do—refers the case to the U.S. Attorney following the filing of a claim and cost bond, but the U.S. Attorney subsequently decides to commence a civil forfeiture action under another statute that is not exempt from section 983. For example, CBP or ICE–HSI may seize property in a drug case under Title 19, but the U.S. Attorney may believe it advantageous for the Government for strategic reasons to pursue the forfeiture under section 881.

Whenever the Government chooses to pursue forfeiture under a statute subject to section 983 not designated under the Customs carve-out provision, the CAFRA-mandated procedures and deadlines become applicable to the forfeiture case. For example, section 983 changed the deadlines for filing administrative and civil judicial forfeiture actions from those required under pre-CAFRA law and abolished the cost bond.⁸ In “exempted cases,” such as those filed pursuant to Title 19 under the Customs carve-out provision, the Customs laws and supplemental rules require only that forfeiture proceedings be commenced “forthwith” and be prosecuted “without delay.” Under section 983, by contrast, notice of administrative forfeiture generally must be sent within 60 days of the seizure,

⁶ Section 983(i)(2) also exempts from the requirements of CAFRA the following provisions of law which allow for forfeiture: section 983(i)(2)(B) exempts the Internal Revenue Code of 1986; section 983(i)(2)(C) exempts the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 et seq.); section 983(i)(2)(D) exempts the Trading with the Enemy Act (50 U.S.C. App. § 1 et seq.) and the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. § 1701 et seq.) (IEEPA provision added by the USA Patriot Act of 2001, Pub. L. 107-56, Title III, § 316(d), Oct. 26, 2001, 115 Stat. 272, 310); and section 983(i)(2)(E) exempts section 1 of Title VI of the Embargo Act of June 15, 1917 (40 Stat. 233; 22 U.S.C. § 401).

⁷ Section 983(i) does not exempt all statutes enforced by CBP and ICE–HSI. The currency and monetary instrument report (CMIR) offenses in Title 31, smuggling offenses under 18 U.S.C. § 545, and other provisions are not exempted from the requirements of CAFRA.

⁸ 18 U.S.C. § 983(a)(2)(E) provides that “any person may make a claim under subparagraph (A) [of section 983(a)(2)] without posting bond with respect to the property which is the subject of the claim.”

and the civil judicial complaint must be filed within 90 days of the filing of a claim contesting the administrative forfeiture. *See* section 983(a).⁹

Choosing to pursue judicial forfeiture under a statute subject to section 983, after CBP has commenced an administrative forfeiture under an exempted statute, presents a few issues: Does the 90-day period for filing a judicial forfeiture action under section 983(a)(3) run from the date the claim was filed with CBP (or ICE–HSI), or from the date the Assistant U.S. Attorney (AUSA) decided to pursue civil forfeiture under a statute subject to section 983? Does the 60-day notice requirement for administrative forfeitures apply retroactively so that a claimant who did not get notice within 60 days of the seizure may demand the return of the property pursuant to section 983(a)(1)(F) on the ground that the Government did not comply with the requirements in section 983(a)(1)(A)? Should the Government return the cost bond?

The question regarding the cost bond is the easiest to resolve. If the Government is no longer pursuing civil forfeiture under a statute exempted from section 983, it has no legal authority to continue to hold the cost bond. In such cases, the U.S. Attorney should advise CBP that the cost bond must be released. On the other hand, if the Government pursues the civil judicial forfeiture under *both* the exempted statute and a statute subject to section 983, the cost bond may be retained as long as the exempted cause of action remains part of the complaint.¹⁰

The question regarding the retrospective application of the 60-day notice requirement is also easy to resolve. If, at the time it seized the property and commenced administrative forfeiture proceedings, CBP or ICE–HSI was acting pursuant to an exempted statute, it is not required to send any notice within any fixed period of time. That the U.S. Attorney subsequently decides to pursue the forfeiture under a statute subject to section 983 does not change that fact. Accordingly, the U.S. Attorney’s charging decision would not retroactively convert a properly conducted administrative forfeiture proceeding into one that constituted a violation of the notice requirements in section 983(a)(1).

Moreover, even if this view were mistaken, the same event that created the retrospective violation—the filing of the civil judicial action under the statute subject to section 983—would render any supposed violation of the notice requirement moot. That is because the Asset Forfeiture and Money Laundering Section (AFMLS) interprets section 983(a)(1)(F), which requires the return of the seized property if the Government fails to comply with the 60-day notice deadline “without prejudice to the right of the Government to commence a forfeiture proceeding at a later time,” as allowing the Government to retain possession of the seized property if it promptly files the civil judicial action upon discovery of the missed deadline. *See Manjarrez v. United States*, 2002 WL 31870533 (N.D. Ill. 2002) (failure to send notice of an administrative forfeiture within the 60-day period prescribed by CAFRA does not bar the Government from commencing a civil judicial forfeiture action against the same property without first returning the property to the claimant). *Accord Return of Seized Property v. United States*, 625 F. Supp. 2d 949, 954-55 (C.D. Cal. 2009) (citing cases), *petition for mandamus*

⁹ Section 983(a)(1) deals with notice of administrative forfeiture actions, which must, in general, be sent to interested persons within 60 days of the seizure of the property.

¹⁰ The Asset Forfeiture and Money Laundering Section (AFMLS) notes that pursuing civil judicial forfeiture under mixed theories (i.e., under statutes subject to section 983 and statutes covered by the Customs carve-out) will be problematic and is not recommended. Among other things, the trial procedure and jury instructions would be extraordinarily complex, given that hearsay would be admissible to allow the Government initially to establish probable cause for forfeiture (outside the presence of the jury) on the exempted theory, while only admissible evidence could be used (in the presence of the jury) to establish the forfeitability of the property by a preponderance of the evidence on the non-exempt theory. Also, if the Government meets its burden under both theories, the innocent owner defense in section 983(d) would apply to the non-exempt theory, but would not apply to the exempted theory.

denied sub nom In re Jordan, 606 F. 3d 1135 (9th Cir. 2010); *United States v. \$11,500.00 in United States Currency*, 797 F. Supp. 2d 1092 (D. Or. 2011). In a case where the supposed violation of the notice requirement does not even occur until the Government has decided to abandon the exempted forfeiture theory in favor of one to which the notice requirement applies, the Government will have filed the judicial action as discussed in section I.F, and maintained custody of the property pursuant to an arrest warrant in rem, before any obligation to return the seized property arises.

How to deal with the 90-day filing requirement in section 983(a)(3) presents a closer question. On the one hand, until the U.S. Attorney determines to pursue the civil judicial forfeiture under statute subject to section 983, the 90-day filing requirement simply does not apply. On the other hand, if the Government routinely seized property under an exempted statute, delayed filing any civil judicial action for more than 90 days after a claimant filed a claim and cost bond, and then filed the judicial forfeiture under a statute subject to section 983, it might create the appearance that the initial seizure under the exempted statute was merely a ruse to allow the U.S. Attorney to avoid complying with section 983 when the Government intended all along to pursue the judicial forfeiture under the statute subject to section 983. Thus, in any case referred by CBP, ICE–HSI, or another agency where the initial seizure was pursuant to an exempted statute, the U.S. Attorney should make the decision whether to switch theories to a non-exempt statute, or to include both exempt and non-exempt theories in the complaint, within 90 days of the filing of the claim and cost bond; and if the decision is made to pursue the forfeiture under the non-exempt statute, the U.S. Attorney should order return of the cost bond and either file the complaint before the 90 days expires or ask the court for an extension of time in accordance with section 983(a)(3).

D. Whether to file a judicial forfeiture action when the timeliness or form of an administrative forfeiture claim is disputed or unclear

The following discussion applies only to claims filed in administrative forfeiture proceedings under statutes subject to 18 U.S.C. § 983 and not under statutes exempted from that section. *See* 18 U.S.C. § 983(i). Claims filed in administrative forfeiture proceedings under such exempted statutes should, in general terms, be handled in the same manner as set forth herein.

At times a document purporting to be a claim filed in an administrative forfeiture proceeding is facially defective or filed out of time, but the claimant disputes that characterization. This section discusses whether, in such cases, the seizing agency should enter a declaration of forfeiture or refer the case to the U.S. Attorney.

D.1 Summary

Section 983(a)(2) requires that a claim contesting an administrative forfeiture action contain certain information and be filed within a certain number of days. If the claim is not filed in accordance with the statute, the seizing agency may enter a declaration of forfeiture pursuant to 19 U.S.C. § 1609. There are times, however, when the claimant may dispute the agency’s characterization of the claim as defective or untimely.

If the seizing agency ignores the claimant’s protestations and proceeds with the declaration of forfeiture without referring the case to the U.S. Attorney, it runs the risk that a court may, in a future proceeding, side with the putative claimant. By that time, it is likely that the 90-day period for commencing a civil judicial forfeiture action pursuant to section 983(a)(3) will have expired, and that civil forfeiture of the property will be barred by the “death penalty” provision in section 983(a)(3)(B).

On the other hand, if the agency routinely forwards untimely or defective claims to the U.S. Attorney, and the U.S. Attorney files a civil judicial forfeiture action to toll the 90-day period, the agency's policy of insisting on strict compliance with section 983(a)(2) will be undermined, and claimants will have little incentive to adhere to the statutory requirements.

On balance, the seizing agencies should continue to adhere to the policy of strict compliance and should only refer apparently valid claims to the U.S. Attorney. The agencies are encouraged to consult with the local U.S. Attorney if the content or timeliness of a claim filed in an administrative forfeiture proceeding is questionable before deciding to issue a declaration of forfeiture. In addition, many agency counsel offices now routinely return a questionable "claim" document to the filing party, with a request for further clarification and adjusting the claim submission deadline in connection with this request.

D.2 Discussion

Section 983(a)(2) provides that a person contesting an administrative forfeiture proceeding must file a claim with the seizing agency not later than the deadline set forth in the letter giving the person notice of the forfeiture, or not later than 30 days after the final day of publication of that notice in a newspaper, if direct notice was not received. *See* section 983(a)(2)(B). Moreover, the statute also provides that the claim must identify the property being claimed, state the claimant's interest in the property, and be made "under oath" subject to penalty of perjury. *See* section 983(a)(2)(c).¹¹ If no valid and timely claim is filed, the seizing agency is entitled to enter a declaration of forfeiture against the property pursuant to 19 U.S.C. § 1609.

If a claim is timely and contains the required information, however, the agency must transfer the case to the U.S. Attorney, who must either commence a civil or criminal forfeiture action in the district court or return the property within 90 days after the agency received the claim. *See* 18 U.S.C. § 983(a)(3)(A). If the U.S. Attorney does not comply with the statutory requirement, and the 90-day deadline is neither waived by the claimant nor extended by the court, the Government must release the property and the civil forfeiture of the property is forever barred. *See* section 983(a)(3)(B).

In the vast majority of cases, no one files a claim, and the seizing agency proceeds to enter the declaration of forfeiture. In most other cases, when a clearly valid and timely claim is filed, the agency transfers the case to the U.S. Attorney as required by law. When the timeliness or adequacy of the claim is in doubt (for example, if the claim asserts the notice was defective because it was sent to the wrong address), the seizing agency may—in its discretion—give the claimant additional time to perfect the claim; but if the claim was untimely, or if the defects are not corrected, the agency has the right to proceed with the administrative forfeiture.

It is clear that the U.S. Attorney's duty to file a civil or criminal forfeiture action in the district court does not arise until a claim is filed with the seizing agency in the proper form. For example, in *Manjarrez v. United States*, 2002 WL 31870533 (N.D. Ill. 2002), the district court held that a claim filed by the claimant's attorney, instead of by the claimant personally, was not under oath as the statute requires, and therefore was not a valid claim. Accordingly, the court held, the 90-day period in which the Government was required to commence a judicial forfeiture action never began to run.

There are times, however, when it is not entirely clear that the claim filed with the seizing agency is defective or untimely. For example, the agency may believe a claim is late because it was filed

¹¹ *See* sec. III, regarding the "under oath" requirement.

after the deadline set forth in the notice letter that the agency sent to the claimant; but the claimant may assert that the notice was defective because it was sent to the wrong address. If the agency is convinced that a claim is incomplete or is filed out of time, and it sticks to its guns and proceeds with the administrative forfeiture without referring the case to the U.S. Attorney, there is always the chance that a court will agree with the claimant and hold that the Government should have filed a judicial forfeiture action within the 90-day period prescribed by section 983(a)(3)(A). In that case, because there is no provision in the statute tolling the 90-day period while such disputes are resolved, it is likely that the Government will find itself outside of the 90-day period and unable to pursue the civil forfeiture of the property. *Cf. United States v. Thirty-Four Thousand Nine Hundred Twenty-Nine and 00/100 Dollars (\$34,929.00) in U.S. Currency*, 2010 WL 481250, at *2-3 (S.D. Ohio, Feb. 5, 2010) (agreeing with *Manjarrez* that a claim signed only by counsel was deficient but holding that where claim signed by counsel was filed together with affidavit signed by owner-client under penalty of perjury reciting that the owner-client had reviewed the claim and found it true and accurate in every respect, the two documents together constituted a sufficient claim).

On the other hand, if the seizing agency forwarded every questionable case to the U.S. Attorney, the agency's policy of insisting on strict compliance with the terms of section 983(a)(2) would be rendered meaningless, and claimants would have little incentive to comply with those terms.

What is truly needed to resolve this problem is a provision in the statute tolling the 90-day period while any dispute as to the adequacy or timeliness of the claim filed in the administrative forfeiture proceeding is resolved by the court. But the absence of such a provision does not mean that the Government must liberally construe the otherwise strict requirements of section 983(a)(2). In fact, a recent decision by the Court of Appeals for the Third Circuit suggests that when there is a bona fide dispute as to the timeliness of a claim, the court should *equitably toll* the period for filing the judicial action to avoid any injustice to the Government.

In *Longenette v. Krusing*, 322 F.3d 758 (3d Cir. 2003), a claimant mailed his claim to the seizing agency within the statutory time period, but the agency did not receive the claim until after the time period expired. The agency assumed that the claim was untimely and entered a declaration of forfeiture, but the claimant disagreed and filed an action to recover his property in the district court. Ultimately, after protracted litigation, the court of appeals held that the claimant was correct: under pre-CAFRA law, at least, the timeliness of a claim filed in an administrative forfeiture proceeding by a prisoner was determined by the "mailbox rule." That is, the claim was deemed to have been filed when it was mailed. *Accord Karis v. United States*, 2006 WL 27085555, *6 (N.D.N.Y. Sept. 20, 2006) (applying mailbox rule to a claim filed by an incarcerated person in a case controlled by CAFRA).¹²

By this time, however, the five-year statute of limitations for filing a civil forfeiture action had expired. The claimant argued that, accordingly, the Government should be required to release the property and should be forever barred from commencing a civil forfeiture action. But the Third Circuit held that in fairness to the Government, given the novel legal issue involved, the statute of limitations would be equitably tolled. Thus, the Government was given six additional months in which to commence a new forfeiture action against the property.

¹² The rule seems to be otherwise for claims filed by persons who are not prisoners. See *Sandoval v. United States*, 2001 WL 300729 (S.D.N.Y. 2001) (claim is considered filed in a civil forfeiture action when it is received by the seizing agency, not when it is mailed by the claimant); *Florez-Perez v. United States*, Case No. 3:99-cv-1230-J-20A (M.D. Fla. Sept. 1, 2000) (claim sent by Federal Express on the last day for filing a claim but not received by the DEA until the next day was not timely filed).

While *Longenette* was a pre-CAFRA case involving the five-year statute of limitations under 19 U.S.C. § 1621, and not the 90-day filing deadline under section 983(a)(3), a similar argument may be made when the Government, in good faith, enters a declaration of forfeiture believing that the claim filed in an administrative forfeiture proceeding was inadequate or untimely, but is ultimately mistaken in that belief, the U.S. Attorney may argue that the time for filing a judicial action should be equitably tolled.

There is no guarantee, of course, that any court will agree with the Government on this point. But the availability of that remedy, coupled with the disadvantages of routinely referring all cases involving defective or untimely claims to the U.S. Attorney, militates in favor of taking the more aggressive approach on this issue.

It should be added, however, that in any case in which the legal issues regarding the adequacy or timeliness of a claim are unclear, the seizing agencies are encouraged to consult with the U.S. Attorney before deciding to go forward with the administrative forfeiture of the property. Such consultations—particularly in cases where further litigation is likely—will give the U.S. Attorney, who ultimately will have to defend the agency’s action in the district court, the opportunity to advise the agency on the strengths and weaknesses of its position and the risks involved in not transferring the case for judicial forfeiture.

D.3 Conclusion

Seizing agencies should insist on strict compliance with the filing requirements of section 983(a)(2), and should not routinely refer defective claims to the U.S. Attorney just because a claimant insists that a claim contained all of the required information and was timely filed. The agencies, however, should consult with the U.S. Attorney regarding any claims in which the adequacy or the timeliness of the claim is unclear. If the agency rejects the claim and declares forfeiture, but a court ultimately decides that the claim filed in that proceeding was valid, the U.S. Attorney should argue that the 90-day period for filing a judicial forfeiture action under section 983(a)(3) should be equitably tolled.

E. 60-day notice period in all administrative forfeiture cases

E.1 Background

Through the many forfeiture statutes, Congress has made clear its intent that the Government be expeditious in providing notice and in initiating forfeiture actions against seized property. Further, a fundamental aspect of due process in any forfeiture proceeding is that notice be given as soon as practicable to apprise interested persons of the pendency of the action and afford them an opportunity to be heard.

Notice to owners and interested parties of the seizure and intent to forfeit in any non-judicial civil forfeiture proceeding is governed by section 983(a)(1), which requires “written notice” to all interested parties.

E.2 60-day notice

Section 983(a)(1) requires that written notice of an administrative forfeiture action be sent to interested parties as soon as practicable but no later than 60 days after the date of the seizure. For interested parties determined after seizure, the written notice shall occur within 60 days after

reasonably determining ownership or interest. *See* section 983(a)(1)(A)(v). Waivers of this notice deadline may be obtained in writing in exceptional circumstances from a designated official within the seizing agency. *See* section 983(a)(1)(B). The exceptional circumstances are those set forth in section 983(a)(1)(D).

If a waiver is granted, it must set forth the exceptional circumstances and be included in the administrative forfeiture case file. A waiver issued under this provision, however, is valid for no more than 30 days. If additional time is required, the waiver must be extended by a judicial officer pursuant to section 983(a)(1)(C).

F. Inadvertent violation of 60-day deadline for sending notice

This section discusses what action the Government should take if it discovers that the seizing agency has inadvertently failed to send notice of the commencement of administrative forfeiture proceedings within 60 days of the seizure of the property as required by section 983(a)(1)(A).

F.1 Summary

Failure to comply with the 60-day deadline for sending notice precludes the Government from pursuing administrative forfeiture of the seized property and requires that the property be returned to the property owner. Section 983(a)(1)(F), however, permits the Government to file a judicial forfeiture action—civil or criminal—against the same property, and to re seize the property with either civil or criminal process. If the judicial action is commenced as soon as practicable after the discovery of the inadvertent failure to send notice, the Government may maintain custody of the property pursuant to the new civil or criminal process without having to go through the exercise of returning the property and seizing it back. References in this section to the notice deadline apply to whatever deadline may be applicable in a given case, be it the 60-day deadline, the 90-day deadline, or some other deadline established pursuant to the statutory procedure for obtaining an extension of time.

F.2 Discussion

Section 983(a)(1)(A)(i) provides that in non-judicial forfeiture proceedings,¹³ the Government must send notice of the forfeiture within 60 days after the date of the seizure. Section 983(a)(1)(A)(iv) extends the deadline to 90 days in cases where the forfeiture is adopted from a state or local law enforcement agency. The statute also contains various exceptions to the notice deadlines and a procedure for obtaining extensions of time.

Congress enacted these deadlines to ensure that property owners are given timely notice of their right to contest a forfeiture and are apprised of the procedures for doing so. Hence, law enforcement agencies should endeavor at all times to adhere to the notice deadlines and obtain extensions of time for sending notice only when necessary, and only in the manner described in the statute. *See* sections 983(a)(1)(B) and (C). Intentionally ignoring a notice deadline in order to delay the sending of notice to the property owner or other interested parties is not permissible.

¹³ The notice requirement in section 983(a)(1) applies to all cases where the property was seized for the purpose of forfeiture, and administrative forfeiture is permissible under 19 U.S.C. § 1608 and not barred by 18 U.S.C. § 985. Seizures that are strictly for evidence, that are undertaken only pursuant to a criminal seizure warrant (21 U.S.C. § 853(f)), or that cannot, by statute, lead to an administrative forfeiture proceeding, do not trigger the notice requirements of section 983(a)(1).

There are times, however, when the failure to send notice within the statutory period is purely inadvertent. The question that arises in such cases is what action the Government must take to rectify the situation.

Section 983(a)(1)(F) provides as follows:

If the Government does not send notice of a seizure of property in accordance with subparagraph (A) to the person from whom the property was seized, and no extension of time is granted, the Government shall return the property to that person *without prejudice to the right of the Government to commence a forfeiture proceeding at a later time*. The Government shall not be required to return contraband or other property that the person from whom the property was seized may not legally possess.

(Emphasis added.)

In our view, subparagraph (F) evinces Congress’s intent to ensure that seized property does not indefinitely remain in the hands of the Government without the property owner having any opportunity to contest the forfeiture in a court of law. Thus, if the Government fails to send notice to the person from whom the property was seized within the statutory period for sending notice, it must return the property to that person (unless the property was contraband).

Section 983(a)(1)(F) also makes clear, however, that the Government is permitted to commence a new forfeiture proceeding. This presents two questions: Can the new proceeding be administrative, or must it be judicial? And can the Government re seize the property from the property owner when it commences the new proceeding?

While the statute does not make clear whether the new forfeiture proceeding can be administrative or must be judicial, we reject the view that section 983(a)(1)(F) permits the Government to re seize property for administrative forfeiture, thus starting the clock for sending notice all over again. The statute does not prohibit such action, but returning property to a property owner after the Government has missed the notice deadline, only to snatch the property back from the owner in order to start the clock over again, may violate the spirit of the legislation, and create the appearance that the Government is trying to circumvent the statutory requirement. Thus, it is our view that once the Government misses the notice deadline for administrative forfeiture, and has returned the property pursuant to section 983(a)(1)(F), no new administrative forfeiture should be commenced against the same property based on the violation that led to the initial seizure, unless there are extraordinary circumstances indicating that return of the property would be contrary to the public interest.

On the other hand, section 983(a)(1)(F) does permit the Government to commence either a civil or criminal forfeiture action in court. In the case of a criminal action, the Government may name the property in an indictment or information and obtain a criminal seizure warrant, a restraining order, or some other order under 21 U.S.C. § 853(e).¹⁴ In the case of a civil judicial action, the Government may file a complaint and obtain an arrest warrant in rem for the property pursuant to Supplemental Rule G(3)(b). Like the criminal seizure warrant, the arrest warrant in rem gives the Government a lawful basis to maintain custody of the property pending the resolution of the case in court. Thus, once the Government commences a judicial forfeiture action—either civil or criminal—against the property, it may re seize the property and hold it pending the resolution of the forfeiture case.

¹⁴ See *In Re: 2000 White Mercedes ML320*, 220 F. Supp. 2d 1322, 1326 n.5 (M.D. Fla. 2001) (if property is already in Government custody, no section 853(f) seizure warrant can be issued, as an order under section 853(e) would be sufficient to preserve the property; a section 853(e) order need not be an injunction or restraining order, but can be any order that will “assure the availability of the property”), *aff’g* 174 F. Supp. 2d 1268 (M.D. Fla. 2001).

This matter is not without some ambiguity. It is possible to read section 983(a)(1)(F) to say that once the 60-day notice deadline is missed, the property must be returned to the property owner, and must remain in the owner's possession even though a civil or criminal forfeiture action is commenced in court. AFMLS does not think, however, that this was the intent of Congress. Again, the purpose of section 983(a)(1)(F) was to ensure that the Government did not hold property indefinitely without giving the property owner a day in court. Absent extraordinary circumstances, if the notice deadline has passed, *and no forfeiture action is pending*, the property must be returned to the person from whom it was seized.¹⁵ But once a judicial forfeiture action is filed, and the property owner is assured of a day in court, the Government can maintain the property in its possession as it would in any other forfeiture case, subject only to the "hardship" provisions in section 983(f). That, in our view, is what Congress meant by the language in section 983(a)(1)(F) providing that the return of the property is "without prejudice" to the right of the Government to commence a forfeiture proceeding at a later time.

The remaining question is whether, in cases where the Government files the criminal or civil judicial action immediately upon discovering the failure to send notice within the 60- or 90-day period, it is necessary to go through the exercise of physically returning the property to the property owner, only to re seize it immediately thereafter. AFMLS thinks that exercise is unnecessary.

Returning the property with one hand while seizing it back with the other, pursuant to an arrest warrant in rem or criminal seizure warrant, is an empty gesture that accomplishes nothing either in terms of the public interest or the private rights of the property owner. Moreover, proceeding directly to a judicial forfeiture action while maintaining custody of the property is entirely consistent with the intent of section 983(a)(1)(F). By commencing civil judicial forfeiture actions immediately upon learning of the inadvertent violation of the filing deadline, the Government will, in most cases, be placing property owners in a better position than they would have been in had the Government successfully commenced an administrative forfeiture proceeding.

As set forth in sections 983(a)(2) and (3), if the seizing agency sends notice of the administrative forfeiture action within the statutory period, the claimant has 30 days within which to file a claim to the property, after which the Government has 90 days to commence a civil or criminal forfeiture action in court. In contrast, by proceeding directly to the filing of the civil forfeiture complaint, the Government immediately places claimants in the position they would have been in if they had received the notice, filed a claim, and waited for the Government to file its complaint before the expiration of the 90-day period for doing so—assuming it did not take so long to discover the inadvertent failure to send notice that the 90-day period for filing a complaint would already have expired. Thus, filing a civil forfeiture complaint as soon as may be practicable after learning of the inadvertent violation of the notice deadline is in keeping with the intent of Congress to prevent the Government from holding on to property without giving the property owner a day in court. *See United States v. \$39,480.00 in U.S. Currency*, 190 F. Supp. 2d 929 (W.D. Tex. 2002) (where the Government inadvertently filed its complaint on the 91st day because of a clerical error on the date stamp, claimant suffered no prejudice, and strict enforcement of the 90-day rule would have a "Draconian effect" on the Government's forfeiture case, the court equitably tolled the 90-day period and deemed the complaint timely filed). *Accord United States v. Thirty-Four Thousand Nine Hundred Twenty-Nine and 00/100 Dollars (\$34,929.00) in U.S. Currency*, 2010 WL 481250, at *3 (S.D. Ohio Feb. 5, 2010).

¹⁵ If the judicial forfeiture action cannot be filed immediately, the prosecutor may want to consider obtaining a pre-complaint civil restraining order under section 983(j), or a pre-indictment restraining order under section 853(e), to preserve the property until an action is commenced.

F.3 Conclusion

If a seizing agency discovers that it has inadvertently failed to comply with a deadline for sending notice of the administrative forfeiture of property in a case where such deadlines apply, and the person from whom the property was seized has not waived the 60-day deadline, no further action may be taken to forfeit the property administratively based on the offense giving rise to the original seizure, and the property must be returned to the person from whom it was seized in accordance with section 983(a)(1)(F), unless the return of the property would be unlawful, or unless the Government, as soon as may be practicable, commences a judicial forfeiture proceeding by (1) naming the property in a criminal indictment or information and obtaining a judicial order pursuant to section 853(e) or (f) allowing it to hold the property; or (2) filing a civil judicial forfeiture action and retaining lawful possession of the property pursuant to an arrest warrant in rem.

G. Policy on the deadline for filing a civil forfeiture action in cases that do not begin as administrative forfeiture proceedings

G.1 Issue

In 18 U.S.C. § 983(a)(3), Congress provided that the Government must commence a judicial forfeiture proceeding within 90 days of the receipt by a seizing agency of a claim filed in an administrative forfeiture proceeding. Congress set no deadline, however, for commencing a judicial forfeiture proceeding in cases that do not start out as administrative forfeiture proceedings in the first instance. The question is what deadline applies to the commencement of a judicial forfeiture action when property is seized for forfeiture but there is no administrative forfeiture proceeding.

G.2 Summary

There are two situations in which this issue arises: when the Government could have commenced an administrative forfeiture proceeding against the seized property but, for whatever reason, opted not to do so, and when the Government is barred from forfeiting the property administratively by the limitations on such proceedings in 19 U.S.C. § 1607. The 90-day deadline in section 983(a)(3) does not apply in either situation, nor is there any other statutory deadline for commencing such actions. Nevertheless, as a matter of policy, the Department of Justice advises prosecutors that whenever administrative forfeiture is statutorily authorized but is not pursued, the U.S. Attorney should commence a judicial forfeiture action (civil or criminal) within 150 days of the seizure of the property. Moreover, the Department advises that when property is seized for forfeiture but cannot be forfeited administratively because of the limitations set forth in section 1607, the U.S. Attorney should commence a judicial forfeiture action within 90 days of the receipt of a written request for the release of the property from a potential claimant.

G.3 Discussion

G.3.a Section 983(a)(3)

Forfeiture cases typically begin with the seizure of property and the commencement by the seizing agency of administrative forfeiture proceedings. Indeed, it is the policy of the Department of Justice that all forfeiture cases should begin as administrative forfeiture proceedings when it is possible to do so. *See* section I.A. However, in certain circumstances, cases will take different paths to final forfeitures.

When a claimant files a proper claim in an administrative forfeiture proceeding, the seizing agency must suspend the proceeding and refer the case to the U.S. Attorney. This has long been the law. Prior to the enactment of CAFRA, however, there was a widespread concern with the absence of any mechanism for forcing the Government to commence a judicial forfeiture proceeding in a timely way once a claimant had filed his claim with the seizing agency. Defense counsel complained that by filing such a claim, the claimant had done everything in his power to bring the administrative forfeiture proceeding to a halt and to demand his “day in court,” yet the Government was free to sit on the case for months or years while it determined whether to proceed with the forfeiture civilly or criminally or to return the property to the claimant. In a series of cases, the Supreme Court and the lower courts had upheld this practice against constitutional challenge. *See United States v. \$8,850 in U.S. Currency*, 461 U.S. 555, 565 (1983) (applying the four-part test from *Barker v. Wingo*, Supreme Court finds that 18-month delay in commencing civil forfeiture action did not violate due process).

In CAFRA, Congress responded to this concern by enacting section 983(a)(3). The statute provides that “not less than 90 days after a claim has been filed,” the Government must file a civil forfeiture complaint, include the property in a criminal indictment, return the property, or obtain an extension of time from the court. Thus, it is now fairly clear what the Government must do if (1) it commences an administrative forfeiture proceeding pursuant to section 983(a)(1), and (2) a claimant files a timely claim in proper form pursuant to section 983(a)(2).

G.3.b Cases that do not begin administratively

Congress did not consider, however, that not all forfeiture cases begin as administrative forfeitures. Notwithstanding the policy favoring administrative forfeiture, there are occasions when an AUSA may wish to by-pass the administrative forfeiture process and file a case directly as a civil forfeiture or as part of a criminal prosecution. Moreover, 19 U.S.C. § 1607, the statute that sets the boundaries for what may be forfeited administratively, expressly bars the administrative forfeiture of certain property, including all real property and most personal property having a value in excess of \$500,000, except for currency. Because section 983(a)(3) applies only to cases that begin as administrative forfeitures, CAFRA contains no deadline governing when the Government must commence judicial forfeiture proceedings when it seizes property for forfeiture in those two instances.

At present, the only guidance the courts have given in this situation is that the pre-CAFRA constitutional limitations endorsed by the Supreme Court in *\$8,850* still apply.

G.3.c Policy concerns

While no statute requires the Government to set a filing deadline for commencing a judicial forfeiture action in cases that do not begin as administrative forfeitures, there are several legal and political considerations that militate in favor of establishing a policy in that regard.

First, Congress was clearly concerned with the absence of a mechanism to force the Government to give a potential claimant timely access to the courts once his property was seized. The deadline for commencing an administrative forfeiture proceeding (generally 60 days pursuant to section 983(a)(1)), and then for commencing a judicial action once a claimant files a claim (90 days pursuant to section 983(a)(3)), reflect that. If the Government were to seize property for forfeiture in a situation where administrative forfeiture was authorized, but then ignore the 60- and 90-day deadlines in sections 983(a)(1) and (3) on the ground that it intended all along to skip over the administrative forfeiture

process and proceed directly with a judicial forfeiture, courts might suspect that the Government was actually conjuring an ad hoc excuse for missing the statutory deadlines, or had decided to by-pass the administrative forfeiture proceeding for the express purpose of circumventing the statutory deadlines and the underlying congressional intent. The likely consequences of creating the appearance of trying to do an end-run around the statutory deadlines include renewed efforts by Congress to curtail the Government's ability to forfeit property administratively or civilly, and judicial decisions applying the statutory deadlines to cases where there was no administrative forfeiture, even though they were never meant to apply in that context.

Similar concerns apply to the second category of cases as well. While it cannot be denied that certain categories of cases could not be prosecuted as administrative forfeitures even if the Government wanted to do so, *see* 19 U.S.C. § 1607, the courts are reluctant to conclude that Congress would not have wanted to force the Government to be at least as timely in commencing a forfeiture action when the property is valued at more than \$500,000 as it must be when the property is worth far less. Thus, there have been a number of cases in which courts have pressed prosecutors to concede that there must be a deadline for filing a judicial forfeiture action in such cases, even though no such deadline exists. By adopting a deadline for commencing a judicial action in such cases by policy or regulation, the Department of Justice may be able to relieve prosecutors of the pressure to adopt ad hoc deadlines on a case by case basis, and might forestall judicial attempts to cut back on the constitutional doctrine enshrined in the *\$8,850* decision.

G.3.d Policy on filing a judicial forfeiture action

In light of the foregoing considerations, it is the policy of the Department of Justice that prosecutors commence civil or criminal forfeiture actions in accordance with the following schedule when property is seized for forfeiture but there is no administrative forfeiture proceeding.

In cases where administrative forfeiture is possible under section 1607, but the Government has elected for whatever reason to by-pass the administrative forfeiture process, the U.S. Attorney should file a civil or criminal action for the forfeiture of the property within 150 days of the seizure of the property. This reflects the total time that the Government would have had to commence such an action, or to include the property in a criminal indictment, if the Government had chosen to proceed in the normal way: 60 days for the commencement of an administrative forfeiture proceeding plus 90 days to file a civil forfeiture complaint or to include the property in a criminal indictment. By following this policy, the prosecutor will thus deflect any concern that the Government by-passed the administrative forfeiture process to circumvent the CAFRA deadlines.

It should be emphasized that this policy applies only in cases where the U.S. Attorney, in consultation with the seizing agency, affirmatively decides at the outset of a case that the forfeiture of the seized property will be done judicially in the first instance. It does not apply to cases where the seizure should have been handled as a routine administrative forfeiture to which the 60- or 90-day deadlines in section 983(a)(1)(A) apply, but where the notice was not sent due to inadvertence or error. The policy regarding the handling of forfeitures in that situation is set forth in section I.F.

In cases where administrative forfeiture is barred by section 1607, it is not necessary to establish a fixed deadline for commencing a judicial forfeiture action based on the date of the seizure. Congress set no deadline in this instance, and it is not necessary for the Government to adopt one. But the Government should not be free to ignore indefinitely a request made by a potential claimant for

the release of his property or for the commencement of formal judicial proceedings. Accordingly, in a case where the U.S. Attorney receives such a request in writing, the prosecutor should treat the request as if it were a “claim” referred to in section 983(a)(3)(A), and should thus commence a judicial forfeiture action within 90 days of the receipt of the request.¹⁶

Nothing in this policy should be interpreted to allow a potential claimant to shorten the deadline for commencing an administrative forfeiture in a case where administrative forfeiture is authorized. In all events, in such cases the seizing agency will have 60 days (or 90 days in the case of adoptive forfeitures) to determine whether or not to proceed with the forfeiture proceeding. *See United States v. \$200,255 in U.S. Currency*, 2006 WL 1687774, at *4 (M.D. Ga. 2006) (under the scheme set forth in section 983(a)(1), the administrative forfeiture proceeding does not begin until the seizing agency sends notice to potential claimants; then the claimant files his claim; a claim filed before the seizing agency sends notice is premature and does not start the clock running on the time to file a judicial forfeiture complaint).

II. Interplay of Administrative Forfeiture and Criminal Forfeiture

A. Starting a case administratively

A recurring issue concerns the interplay of criminal and administrative forfeiture. In general, there is no reason for the seizing agency not to commence administrative forfeiture proceedings against property even if the property could be included in a future criminal indictment. Therefore, in most cases, the seizing agency will immediately commence administrative forfeiture proceedings against seized property by sending notice to potential claimants, while simultaneously the U.S. Attorney will ask the grand jury to include a forfeiture allegation against the same property in a criminal indictment. This is perfectly proper practice. However, if no claim is filed in the administrative forfeiture proceeding, the property will automatically be forfeited.

In cases where the property has been included in a criminal indictment but has been successfully forfeited administratively, it is necessary to file a motion with the court to dismiss the forfeiture allegation from the indictment to avoid a situation in which the court, the defendant, or the jury becomes confused and mistakenly believes that the Government abandoned the administrative forfeiture once the indictment was returned. Accordingly, in cases where administrative and criminal forfeiture proceedings are instituted simultaneously, and no one files a claim in the administrative proceeding, the agency should complete the administrative forfeiture, and the AUSA handling the criminal case should file a motion reporting the completed forfeiture and therefore striking the forfeiture from the indictment.

Once Government counsel serves the motion to dismiss the forfeiture allegation from the indictment on defense counsel, the defendant is aware of the administrative forfeiture and is not expecting to have an opportunity to contest the forfeiture in the criminal case. In that situation, the defendant would be estopped from later contesting the administrative forfeiture on the ground that the defendant never received notice of the administrative forfeiture or he or she thought the forfeiture would be handled criminally. On the other hand, if the defendant responds to the motion by stating that he or

¹⁶ *See United States v. \$3,294.00 in U.S. Currency*, 2006 WL 1982852, at *5 (D. Utah 2006) (where property was seized for evidence, not for forfeiture, and there was no administrative forfeiture, Government’s decision to delay the civil forfeiture for four years until after the criminal case was over did not violate due process under \$8,850, but suggesting that the claimant could have triggered the 90-day deadline under section 983(a)(3) by filing a claim *sua sponte*).

she would have contested the administrative forfeiture but for the indictment, the prosecutor should either withdraw the motion and proceed with the criminal forfeiture, or ask the court to conduct a hearing to determine if the defendant's assertion is bona fide. If the court finds that the defendant was properly notified of the administrative forfeiture and did not file a claim, it should enter an order to that effect and grant the motion to strike the forfeiture allegation. But if the court finds that the defendant may in fact have been confused regarding the status of the administrative forfeiture, the Government should proceed with the criminal forfeiture.

B. Requesting the seizing agency to suspend the administrative forfeiture

In an extraordinary case, the U.S. Attorney may have a reason why the case should not be handled administratively and may ask the seizing agency to suspend the administrative forfeiture in favor of criminal forfeiture. Seizing agencies will generally comply with that request, but the U.S. Attorney may then have to take steps to ensure that the 60-day deadline for commencing an administrative forfeiture proceeding under section 983(a)(1)(A) is not violated. *See* section 983(a)(1)(A)(iii) (no notice of administrative forfeiture is required if, before the 60-day period expires, a grand jury returns an indictment naming the property, and the Government takes steps to preserve its right to maintain custody of the property under the criminal forfeiture laws).

C. Disposing of administrative forfeiture in a plea agreement

Criminal prosecutors cannot agree to return property that has already been forfeited administratively as part of a plea agreement in a criminal case. Once the property has been forfeited, it belongs to the Government, and may have already been liquidated, put into official use, or shared with a state or foreign law enforcement agency. Thus, the U.S. Attorney has no authority to agree to return such property as part of a plea agreement in a criminal case.

Moreover, recognizing that the seizing agencies often have put considerable resources into the administrative forfeiture of property by the time the prosecutor is negotiating a plea agreement, the U.S. Attorney should not agree to the return of property as part of a plea agreement if the property is subject to an ongoing administrative forfeiture proceeding unless (1) the seizing agency is requested to suspend the administrative forfeiture and it agrees to do so, or (2) AFMLS approves the decision to return the property.

D. Seizure pursuant to a criminal warrant: availability of administrative forfeiture

This section deals with issues that arise when property is seized with a criminal seizure warrant but the seizing agency nevertheless wants to initiate administrative forfeiture proceedings. This is the reverse of the situation discussed in section II.A, which dealt with pursuing criminal forfeiture after property was seized for civil or administrative forfeiture.

D.1 Summary

There are two separate issues here. The first is whether a seizing agency can begin a forfeiture proceeding as a criminal forfeiture (i.e., by seizing the property with a criminal seizure warrant under section 853(f)) and then convert the proceeding to an administrative one without reseizing the property or taking some other action under the civil forfeiture statutes. The second is whether such

an administrative forfeiture must be conducted in accordance with the 60-day deadline and other procedural requirements enacted by CAFRA.

The answer to the first question appears to be yes. Despite the common practice of commencing an administrative forfeiture only after the property has been seized pursuant to a civil warrant or valid warrantless seizure, there is no reason why property seized pursuant to a criminal warrant issued under section 853(f) cannot be forfeited administratively. There is no requirement in such cases that the Government re seize the property from itself with a civil warrant.

The second question is more difficult. The 60-day requirement in section 983(a)(1) that was enacted by CAFRA does not, by its terms, apply to criminal forfeiture proceedings. Thus, the 60-day clock never starts to tick if property is seized pursuant to a criminal seizure warrant. However, if the Government were routinely to seize property with a criminal warrant, ignore the 60-day deadline for commencing an administrative forfeiture proceeding, and then commence such a proceeding at a later date, it would create the appearance of misusing the criminal forfeiture process as a way of evading CAFRA's strict deadlines. Therefore, except in extraordinary circumstances, if the Government desires to commence administrative forfeiture proceedings against property seized pursuant to a criminal seizure warrant, it should do so within 60 days of the seizure. If the 60-day deadline has passed, and the Government still desires to pursue the forfeiture civilly instead of criminally, the case should be referred to the U.S. Attorney to commence a civil judicial proceeding.

D.2 Discussion

Most civil forfeiture statutes authorize the seizing agency to forfeit seized property administratively in accordance with the Customs laws. *See, e.g.,* 18 U.S.C. § 981(d) and 21 U.S.C. § 881(d) (incorporating the provisions of 19 U.S.C. § 1602 et seq. into the civil forfeiture statutes). Nothing in the incorporated provisions of Title 19 limits administrative forfeiture to cases where the property was seized pursuant to a particular kind of seizure warrant. To the contrary, section 1603(a) provides that property may be seized for administrative forfeiture “upon process issued in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure [i.e., Rule 41], [or] any seizure authority otherwise provided by law.” Thus, nothing in the Customs laws themselves would preclude the commencement of administrative forfeiture proceedings following the seizure of property pursuant to a criminal seizure warrant issued under section 853(f).

Likewise, the civil forfeiture statutes themselves do not prescribe a particular form of warrant to be used to commence a civil—and hence, an administrative—forfeiture proceeding. Section 981(b)—which governs seizures for the purpose of civil forfeiture under both that section and the drug laws¹⁷—provides that property may be seized either pursuant to a warrant “obtained in the same manner as provided for a search warrant under the Federal Rules of Civil Procedure” or without a warrant if (1) there is probable cause to believe the property is subject to forfeiture and an exception to the fourth amendment warrant requirement would apply, or (2) the property was seized by a state or local agency and transferred to a federal agency. *See* sections 981(b)(1) and (2).

Finally, it is now established that there is nothing improper about the Government beginning a case criminally and then deciding to proceed civilly, or vice versa. *See United States v. Leyland*, 277 F.3d 628 (2d Cir. 2002) (there is nothing improper about beginning forfeiture as an allegation in a criminal

¹⁷ *See* 21 U.S.C. § 881(b) (incorporating 18 U.S.C. § 981(b)).

indictment and then switching to civil forfeiture); *United States v. Candelaria-Silva*, 166 F.3d 19 (1st Cir. 1999) (there is nothing improper in the Government beginning a forfeiture case with a civil seizure and switching to criminal forfeiture once an indictment is returned; it is commonplace). Moreover, CAFRA specifically authorizes parallel administrative and criminal forfeiture actions. See section 983(a)(1)(A)(iii)(I). Thus, administrative forfeiture under the Customs laws may be commenced in respect of any property seized by a federal law enforcement agency (including property seized by a state or local agency and transferred to a federal agency for the purpose of adoptive forfeiture) without regard to the nature of the warrant that was used to seize the property.¹⁸

The second question is whether such administrative forfeiture proceedings must be commenced within the 60-day deadline set forth in section 983(a)(1)(A). Section 983(a)(1)(A)(i) provides that in non-judicial forfeiture proceedings,¹⁹ the Government must send notice of the forfeiture action within 60 days after the date of the seizure. Section 983(a)(1)(A)(iv) extends the deadline to 90 days in cases where the forfeiture is adopted from a state or local law enforcement agency. The statute also contains various exceptions to the notice deadlines and contains a procedure for obtaining extensions of time.²⁰

Congress enacted these deadlines to ensure that property owners are given timely notice of their right to contest an administrative forfeiture action and are apprised of the procedures for doing so. But the statute, by its terms, only applies to *non-judicial* forfeiture proceedings, and thus cannot, and does not, apply to criminal forfeiture proceedings which must, in all cases, be judicial proceedings. Accordingly, if the Government seizes property for the purpose of criminal forfeiture and proceeds solely along the criminal forfeiture track, the 60-day deadline under section 983(a)(1)(A) never comes into play.

To be sure, there will be cases where the Government seizes property for criminal forfeiture, intending at all times that the forfeiture will be made a part of the criminal case, but then finds that the criminal forfeiture option is not viable.²¹ In such cases, there is nothing in the law preventing the Government from switching to civil forfeiture, or forfeiting the property administratively. Nor would the Government be required in such circumstances to seize the property from itself with a civil seizure warrant in order to commence the civil or administrative forfeiture proceeding. CAFRA does contain an odd

¹⁸ In *United States v. Millan-Colon*, 836 F. Supp. 994 (S.D.N.Y. 1993), a district court held that it was improper for the Government to commence administrative forfeiture proceedings against property that had already been included in a criminal indictment and was subject to a pre-trial restraining order in the criminal case. As mentioned in the text, that case appears to be inconsistent with later Second Circuit law, see *Leyland*, *supra*, and CAFRA. Moreover, *Millan-Colon* is easily distinguished from most cases in that the pre-trial restraining order in that case may have signaled to the defendant that he did not need to respond to the notice of the administrative forfeiture proceeding. As mentioned in section II.A, such misunderstandings will be avoided if, once parallel administrative and criminal forfeiture proceedings have been commenced and the claimant fails to file a timely claim in the administrative forfeiture proceeding, the Government moves to strike the forfeiture allegation from the criminal indictment, thus giving the defendant a fair opportunity to argue that the default in the administrative proceeding was based on an assumption that the forfeiture in the criminal case could be opposed.

¹⁹ For purposes of section 983(a)(1), a non-judicial forfeiture proceeding is any proceeding in which (1) the motive for the seizure was, at least in part, to take custody of property that the Government intended to pursue in a civil forfeiture action; and (2) administrative forfeiture is permissible under section 1608 and notwithstanding section 985. Seizures that are strictly for evidence, that are undertaken for the purpose of criminal forfeiture, or that cannot, by statute, lead to an administrative forfeiture proceeding do not trigger the notice requirements of section 983(a)(1). See Cassella, “The Civil Asset Forfeiture Reform Act of 2000,” 27 J. Legislation 97, 127 (2001).

²⁰ References in this section to the notice deadline apply to whatever deadline may be applicable in a given case, be it the 60-day deadline, the 90-day deadline, or some other deadline established pursuant to the statutory procedure for obtaining an extension of time.

²¹ Among other reasons, it may turn out that the defendant has died or is a fugitive, that criminal charges cannot be presented to a grand jury for strategic or evidentiary reasons, that the property subject to forfeiture belongs to a third party, or that the property was derived from or involved in an offense other than the offenses to be charged in the criminal case.

and burdensome procedure requiring the Government to obtain new authority to maintain custody of property already in its possession when it switches *from civil forfeiture to criminal forfeiture*. See section 983(a)(3)(B)(ii)(II). But as discussed above, nothing in the civil forfeiture statutes predicates administrative forfeiture proceedings on the use of a particular form of seizure warrant.

Thus, the Government may switch theories of forfeiture from criminal forfeiture to civil or administrative forfeiture at any time. At most, the deadline for commencing an administrative forfeiture would relate back to (i.e., would begin to run from) the date when the decision was made to pursue a non-judicial forfeiture, not the date of the original seizure. If, however, the Government were routinely to assert that it had originally intended to pursue a forfeiture criminally, but after 60 days had passed from the date of the seizure, it had decided to pursue administrative forfeiture instead, it would create the appearance that the criminal forfeiture process had been abused, or was a post hoc invention designed to excuse the Government from having to comply with the 60-day deadline for commencing an administrative forfeiture when the property is seized for civil forfeiture in the first instance.

To avoid such appearance of impropriety, we recommend that whenever the Government commences a criminal forfeiture action by seizing property for the purpose of criminal forfeiture, but later decides to switch theories to forfeit the property under the civil forfeiture statutes, the forfeiture action be referred to the U.S. Attorney for the purpose of filing a civil complaint in the district court unless fewer than 60 days have elapsed since the date of the seizure. Only when the decision to switch theories of forfeiture is made within 60 days of the seizure should the Government consider commencing an administrative forfeiture proceeding against the seized property. There may be other exceptions to this, but the only two that presently come to mind are (1) the extraordinary case where there is clear documentation that the decision to switch from criminal to civil forfeiture was made after the 60 days expired; and (2) a case where the claimant agrees to waive the 60-day notice requirement and allow the Government to proceed administratively (e.g., as part of a settlement or plea agreement.)

III. Form of the Claim

A. Claims must be filed under oath by the claimant, not by an attorney or agent

This section addresses the question whether claims filed by persons contesting forfeiture actions must be filed under oath by the claimants themselves instead of being verified and filed on behalf of the claimant by an attorney or other representative.

A.1 Summary

The statutes and rules governing the filing of claims in administrative, civil, and criminal forfeiture cases all require that the claim be filed under oath by the claimant, and not by his or her attorney or other representative.

A.2 Discussion

With respect to claims filed in administrative forfeiture proceedings, section 983(a)(2)(C)(iii) provides in relevant part that “A claim shall...be made under oath, subject to penalty of perjury.” Moreover, section 983(h) provides that if a court finds that a “claimant’s assertion of an interest in the property was frivolous, the court may impose a civil fine *on the claimant* of an amount equal to 10 percent of the value of the forfeited property.” (Emphasis added.)

These provisions were included in CAFRA to address the concern that by eliminating the cost bond requirement for most forfeitures,²² Congress would be encouraging the filing of false and frivolous claims in administrative forfeiture cases.²³ Given that context, it is clear that Congress intended that the claim be filed by the claimant personally, and that the claimant be the one to swear under oath that the assertions made in the claim are well-founded. See *Manjarrez v. United States*, 2002 WL 31870533 (N.D. Ill. 2002) (claim filed by claimant's attorney, instead of by claimant personally, is not "under oath" as the statute requires, and therefore is not a valid claim) Cf. *United States v. Thirty-Four Thousand Nine Hundred Twenty-Nine and 00/100 Dollars (\$34,929.00) in U.S. Currency*, 2010 WL 481250, at *2-3 (S.D. Ohio Feb. 5, 2010) (agreeing with *Manjarrez* that a claim signed only by counsel is deficient but holding that where claim signed by counsel was filed together with affidavit signed by owner-client under penalty of perjury reciting that the owner-client had reviewed the claim and found in true and accurate in every respect, the two documents together constituted a sufficient claim).

In the case of claims (petitions) filed in the ancillary proceeding in criminal forfeiture cases, the applicable statute is 21 U.S.C. § 853(n). Subsection 853(n)(2) provides in relevant part that "any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States...may...petition the court for a hearing to adjudicate the validity of his alleged interest in the property...." Subsection 853(n)(2) is qualified by subsection 853(n)(3), which mandates that "the petition shall be *signed by the petitioner under penalty of perjury* and shall set forth the nature and extent of the petitioner's right, title, or interest in the property...." (Emphasis added.) This statute appears unequivocal: if the petition must be "signed by the petitioner under penalty of perjury," there is little room to suggest that it could be filed on behalf of a claimant by his or her attorney or other representative.²⁴

Prior to the enactment of Supplemental Rule G, the requirements regarding claims filed in civil judicial forfeiture cases were less clear, but the Rule has removed all ambiguity on this issue. Rule G(5)(a)(i)(C) says that the claim must identify the specific property claimed, identify the claimant, state the claimant's interest in the property, be signed by *the claimant* under penalty of perjury, and be served on the Government attorney handling the case. Accordingly, provisions of the prior law allowing claims to be verified by the claimant's attorney in some cases are no longer in effect.

A.3 Conclusion

In all federal forfeiture cases—including administrative forfeiture proceedings conducted by seizing agencies, civil judicial proceedings, and the ancillary proceedings in criminal cases—a claim filed by a person contesting the forfeiture action must be filed under oath by the claimant him or herself, and not by an attorney or other representative acting on behalf of the claimant.

²² Under pre-CAFRA law, a claimant had to post a bond equal to 10 percent of the value of the seized property. See 19 U.S.C. § 1608. This provision was repealed by 18 U.S.C. § 983(a)(2)(E), except as to forfeiture under the statutes listed in section 983(i).

²³ "The Civil Asset Forfeiture Reform Act of 2000," 27 J. Legis. 97, 142 & nn. 239-40 (2001) (quoting legislative history of the requirement that the claim be filed under oath, subject to the penalty of perjury).

²⁴ Courts have strictly enforced this provision. See *United States v. BCCI Holdings (Luxembourg) S.A. (Fifth Round Petition of Liquidation Comm'n for BCCI (Overseas) Macau)*, 980 F. Supp. 1 (D.D.C. 1997) (petition that is not signed under penalty of perjury and fails to identify asset in which claimant is asserting an interest and nature of that interest does not comply with 18 U.S.C. § 1963(l)(3)); *United States v. BCCI Holdings (Luxembourg) S.A. (Petition of BCCI Campaign Committee)*, 980 F. Supp. 16 (D.D.C. 1997) (petition dismissed because not signed under penalty of perjury). Note: section 1963(l)(3) is the RICO counterpart to section 853(n)(3).

IV. Criminal Forfeiture Procedure

A. Filing a motion for reconsideration in a criminal forfeiture case

A.1 Summary

When the order of forfeiture in a criminal case contains a legal or factual error, the Government may, on certain occasions, file a motion for reconsideration. If the order was entered prior to sentencing, as contemplated by Fed. R. Crim. P. 32.2(b)(2), the filing of the motion for reconsideration is straightforward. If the order is not entered until sentencing, however, the opportunity to move to correct the order may be quite limited. That is because the filing of a motion for reconsideration in a criminal case may not suspend the time for filing an appeal under Appellate Rule 4(b), and because, in any event, the only vehicle for correcting an order of forfeiture once it becomes part of the sentence may be Rule 35(a), which requires that the motion be made, and the relief be granted, within 14 days of the sentence.²⁵

Accordingly, prosecutors should always ask the court to issue a preliminary order of forfeiture as soon as possible in accordance with Rule 32.2(b)(2) so that there is ample opportunity to correct the order before it becomes final at sentencing. Prosecutors should not assume that a motion for reconsideration filed *after* the sentence will suspend the time for appeal.

A.2 Applicable rules and statutes

Fed. R. Crim. P. 35(a) says that motions to correct an “arithmetical, technical, or other clear error” must be filed, and ruled upon, within 14 days after sentencing. Appellate Rule 4(b)(5) says that a motion filed under Rule 35(a) does not suspend the time for filing an appeal.

A.3 The traditional rule is that a motion for reconsideration suspends the time for filing an appeal

Prosecutors frequently find it necessary to file motions for reconsideration in criminal forfeiture cases because the court, in announcing sentence or issuing the judgment of forfeiture, has misapplied forfeiture law. The traditional rule is that a motion for reconsideration of a judgment or order may be filed at any time before the time to appeal has expired, and that the filing of such a motion suspends the time to file an appeal.²⁶ Indeed, the Supreme Court has applied this rule to motions for

²⁵ The time limit in Rule 35(a) was raised from 7 to 14 days effective December 1, 2009. The Supreme Court’s Order of March 26, 2009, transmitting this amendment to Congress, recites that it “shall take effect on December 1, 2009, and shall govern all proceedings thereafter commenced *and, insofar as just and practicable, all proceedings then pending.*” (Emphasis added). See also 28 U.S.C. § 2074(a). It is inconceivable that application of the 14-day time limit in a case pending on December 1, 2009, would neither be just nor practicable; thus the 14-day period will be used throughout the present discussion.

²⁶ 16A Charles A. Wright et al., *Wright & Miller’s Federal Practice & Procedure* § 3950.10 (2005) (“It is not only those motions expressly listed in Rule 4(b) that stall the running of the time in which to appeal... A timely motion for reconsideration... postpones the appeal time.”); 5 Am. Jur. 2d *Appellate Review* § 303 (2004) (“In an appeal from a District Court to the United States Supreme Court, the time for appeal does not begin to run until the court entering judgment disposes of a proper motion for... reconsideration.”). See *United States v. Ibarra*, 502 U.S. 1, 6 (1991) (rejecting attempts to get around *Healy* and *Dieter*, a motion for reconsideration renders a final decision not final until the district court can rule on the motion, which suspends the time period for filing an appeal); *United States v. Dieter*, 429 U.S. 6, 8 (1976) (“consistent practice in civil and criminal cases alike has been to treat timely petitions for rehearing as rendering the original judgment nonfinal for purposes of appeal for as long as the petition is pending”); *United States v. Healy*, 376 U.S. 75, 77-78 (1964) (same); *United States v. Correa-Gomez*, 328 F.3d 297, 299 (6th Cir. 2003) (citing *Ibarra*, reiterating that a timely motion for reconsideration means that the period to file an appeal begins to run only after the district court has ruled on the motion for reconsideration).

reconsideration filed by the Government in criminal cases. *See United States v. Ibarra*, 502 U.S. 1, 4–6 (1991) (noting the advantages of giving district courts the opportunity to correct their own alleged errors, and thus preventing unnecessary burdens from being placed on the courts of appeals); *United States v. Dieter*, 429 U.S. 6, 8 n.3 (1976).

A.4 Rule 35(a) motions do not suspend the time

In contrast to the traditional rule, Rule 35(a) provides that a motion to correct an “arithmetical, technical, or other clear error” in the defendant’s sentence must be filed, and ruled upon, within 14 days after sentencing.²⁷ Moreover, in 2002, Appellate Rule 4(b)(5) was amended to make clear that a motion filed under Rule 35(a) does not suspend the time for filing a notice of appeal. *See* Advisory Committee Note to 2002 Amendment. The question is whether motions to reconsider orders of forfeiture based on erroneous applications of forfeiture law are, in effect, Rule 35(a) motions that are subject to the seven-day rule and to the provisions of App. Rule 4(b)(5), or whether they are separate motions governed by the traditional rule that a motion for reconsideration may be filed at any time before the time for appeal has expired, and that the motion suspends the time for filing the appeal.

A.5 The rules applicable to Rule 35(a) motions may not apply to motions for reconsideration of a forfeiture order

A strong argument could be made that Rule 35(a) relates only to motions to modify the portion of the sentence governed by the sentencing guidelines. Prior to 1987, Rule 35(a) provided that a court could “correct an illegal sentence at any time.” Rule 35(a), Federal Rules of Criminal Procedure (1986). That provision was stricken by the Sentencing Reform Act as part of the effort to ensure consistency in sentencing under a guidelines system. *See* Pub. L. 98-473; 18 U.S.C. § 3582(c) (stating the narrow grounds on which a sentence of imprisonment may be modified). In 1991, however, the rule was amended to restore narrow authority to correct an “arithmetical, technical, or other clear error.” This was viewed as a codification of cases holding that the courts retained inherent authority to correct such errors notwithstanding the repeal of the former rule. *See* 1991 Advisory Committee Note. But the Advisory Committee was careful to make clear that the narrow exception being created was not intended to create wholesale authority to revise the portion of the sentence governed by the sentencing guidelines. As the Committee Note states, the rule was amended to limit motions to correct the sentence to instances where there was an “obvious error or mistake,” but not to give the court the opportunity “to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence.” *Id.*

In short, the 1987 repeal of former Rule 35(a), and the 1991 amendment that restored the authority to correct certain technical errors within seven days (amended to 14 days effective December 1, 2009), were part of the sentencing reform movement that introduced the use of a guidelines system for determining the period of incarceration that could be imposed on a defendant once he or she was convicted. None of this had anything to do with the forfeiture aspects of the sentence that remain subject to the traditional rule regarding motions for reconsideration.

No court has ever held that the narrow scope of Rule 35(a) applies to a motion to correct the forfeiture aspect of a sentence. While forfeiture is part of sentencing for many purposes, it is undisputed that neither the sentencing guidelines nor the case law interpreting them apply to forfeiture, *see* U.S.S.G.

²⁷ Rule 35(c) defines *sentencing* as the oral announcement of the sentence.

§ 5E1.4 and Commentary (providing that forfeiture is “automatic” upon conviction and thus not governed by the sentencing guidelines); *see United States v. Fruchter*, 411 F.3d 377 (2d Cir. 2005) (*Booker* and *Blakely* do not apply to criminal forfeiture for two reasons: because the Supreme Court expressly stated in *Booker* that its decision did not affect forfeiture under 18 U.S.C. § 3554, and because *Booker* applies only to a determinate sentencing system in which the jury’s verdict mandates a sentence within a specific range; criminal forfeiture is not a determinate system).

Thus, the policy considerations that prompted the 1991 amendment to Rule 35(a) (and the 2002 amendment to App. Rule 4(b)(5))—i.e., the desire for finality in the calculation of the appropriate period of incarceration under the sentencing guidelines—have nothing to do with the forfeiture portion of the sentence. At the same time, the policy considerations that militate in favor of motions for reconsideration on other legal issues—i.e., the advantages of allowing the district court to correct its own errors—apply with full force to the complex issues that arise in applying the asset forfeiture statutes in criminal cases. For these reasons, courts may ultimately hold that a motion for reconsideration of the forfeiture aspect of a criminal sentence is not limited by the provisions relating to subject matter or time set forth in Rule 35(a), and that accordingly, such motions will suspend the time for filing an appeal in accordance with the traditional rule.

A.6 The Department’s policy, however, is to assume that Rule 35(a) applies

There is no guarantee, however, that the courts will agree with this view. In the worst case, courts could hold that Rule 35(a) is the only means by which the Government can move to correct any portion of a criminal sentence, including the order of forfeiture, and that accordingly a motion must be filed, and ruled upon, within 14 days of the sentence. Moreover, if the courts were to reach that conclusion, it would follow that the filing of the motion does not suspend the time for filing an appeal. *See* App. Rule 4(b)(5).²⁸ Accordingly, until this issue is resolved by the courts or by Congress, in a criminal case in which the order of forfeiture is not entered until sentencing, a prosecutor who files a motion for reconsideration of the order should file the motion, and urge the court to rule on it, within 14 days of the sentence. In addition, the AUSA should not assume that the filing of the motion will extend the time for filing an appeal, but should instead file the notice of appeal before the thirtieth day under App. Rule 4(b)(1)(B) regardless of the status of a pending motion for reconsideration. As a

²⁸ None of this has an impact on the Government’s ability to move to correct a clerical error at any time pursuant to Rule 36. For example, if the error was simply the district court’s failure to make the order of forfeiture part of the judgment as required by Rule 32.2(b)(3), in most circuits the error could be corrected pursuant to Rule 36. *See United States v. Bennett*, 423 F.3d 271 (3d Cir. 2005) (if there was a preliminary order of forfeiture to which defendant did not object, the failure to include the forfeiture in both the oral pronouncement and the judgment and commitment order is a clerical error that may be corrected pursuant to Rule 36) (collecting cases); *United States v. Loe*, 248 F.3d 449, 464 (5th Cir. 2001) (if district court forgets to include forfeiture in the judgment, it may, pursuant to Rule 36, amend the judgment *nunc pro tunc*); *United States v. Hatcher*, 323 F.3d 666, 673 (8th Cir. 2003) (if there was a preliminary order of forfeiture, the failure to include the forfeiture in the judgment at sentencing is a clerical error that may be corrected at any time pursuant to Rule 36); *United States v. Thomas*, 67 F. App’x 819 (4th Cir. 2003) (amendment of the judgment pursuant to Rule 36 to include the forfeiture judgment 4 years after sentencing was appropriate as it accurately reflected the district court’s intention at sentencing); *United States v. Arevalo*, 67 F App’x 589 (11th Cir. 2003), *modified* 2004 WL 1253057 (11th Cir. 2004) (failure to make the forfeiture part of the judgment is a clerical error that may be corrected pursuant to Rule 36 as long as the court apprised the defendant of the forfeiture orally at sentencing); *but see United States v. Pease*, 331 F.3d 809, 816-17 (11th Cir. 2003) (the omission of the order of forfeiture from the judgment in a criminal case is not a clerical error that can be corrected pursuant to Rule 36; if the district court does not make the order of forfeiture part of the judgment at sentencing, and the Government does not appeal, the forfeiture is void). Most errors that arise in forfeiture cases, however, are not clerical. *See, e.g., United States v. King*, 2005 WL 1111884 (D.S.C. 2005) (where there was no mention of forfeiture either at sentencing or in the judgment, there is a clear violation of Rule 32.2(b) that cannot be corrected as a clerical error under Rule 36).

courtesy to the district court, the prosecutor may want to advise the court of the Government's policy on this matter so that the court understands the reasons why the Government may feel compelled to file its notice of appeal—which divests the district court of jurisdiction—even though the court may have scheduled a hearing on the Government's motion.

In all cases, however, the interests of justice would be better served if the court were to enter a preliminary order of forfeiture as soon as possible after the entry of a verdict or the acceptance of a guilty plea so that the court would have a full opportunity prior to sentencing to correct any legal or factual error. A motion for reconsideration would always be appropriate if filed after the order is entered but prior to sentencing. If that practice is followed, much unnecessary litigation over the scope of Rule 35(a), and many unnecessary appeals, may be avoided.

A.7 Conclusion

Because the law regarding the application of Rule 35(a) and App. Rule 4(b)(5) to motions to reconsider orders of forfeiture in criminal cases is unclear, AUSAs should act conservatively to protect the Government's right to appeal from the forfeiture portion of a criminal sentence. Until the law on this issue becomes more clear, prosecutors should assume that any motion for reconsideration of a criminal forfeiture order should be filed and ruled upon within 14 days of sentencing in accordance with Rule 35(a), and that the filing of the motion will not suspend the time for filing an appeal under App. Rule 4(b)(1)(B). In all cases, the Government should urge the district court to comply with Rule 32.2(b)(2) in issuing a preliminary order of forfeiture as soon as possible after the entry of a verdict or the acceptance of a guilty plea so that there is ample time to correct the order prior to sentencing.

V. Publication and direct notice of order of forfeiture

A. Civil Forfeiture Cases

Upon the filing of a civil forfeiture complaint, the Government must publish notice of the forfeiture in a manner consistent with the provisions of Supplemental Rule G(4)(a) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. *See* Fed. R. Crim. P. 32.2(b)(6)(C) (eff. Dec. 1, 2009).²⁹ As described in Rule G(4)(a)(iv), this may include publication on the Government's forfeiture website, www.forfeiture.gov. The notice must describe the forfeited property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and the name and contact information for the government attorney to be served with the petition.

Moreover, consistent with Rule G(4)(b), the Government must send direct written notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture. Such notice may be sent by any of the means described in Rule G(4)(b)(iii)-(v).

For the purposes of this policy, "a person who reasonably appears to be a potential claimant with standing to contest the forfeiture" includes any person who appears likely to be able to establish an ownership interest in the property within the meaning of "owner" as defined in 18 U.S.C. § 983(d)(6). As stated in that statute, an "owner" does not include a person with only a general unsecured interest

²⁹ The Supreme Court's Order of March 26, 2009, transmitting this amendment to Congress, recites that it "shall take effect on December 1, 2009, and shall govern all proceedings thereafter commenced *and, insofar as just and practicable, all proceedings then pending.*" (Emphasis added.) *See also* 28 U.S.C. § 2074(a). It is inconceivable that application of the amendment in a case pending on December 1, 2009, would neither be just nor practicable; thus, the amendment would apply to all proceedings from its effective date forward.

in, or claim against, the property or estate of the defendant. *See United States v. Watkins*, 320 F.3d 1279, 1283-84 (11th Cir. 2003) (unsecured creditors lack standing to contest the forfeiture in the ancillary proceeding because they have no interest in the particular assets subject to forfeiture); *United States v. Phillips*, 185 F.3d 183, 187 (4th Cir. 1999) (Government does not have to send notice to persons who lack standing to contest the forfeiture); *United States v. Carmichael*, 440 F. Supp. 2d 1280 (M.D. Ala. 2006) (Government is not required to send direct written notice to unsecured creditors in a criminal forfeiture case).

B. Criminal Forfeiture Cases

Effective December 1, 2009, Federal Rule of Criminal Procedure 32.2(b)(6) provides:

- (A) *Publishing and Sending Notice.* If the court orders forfeiture of specific property, the Government must publish notice of the order and send notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding.
- (B) *Content of the Notice.* The notice must describe the forfeiture property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and state the name and contact information for the government attorney to be served with the petition.
- (C) *Means of Publication; Exceptions to Publication Requirement.* Publication must take place as described in Supplemental Rule G(4)(a)(iii) of the Federal Rules of Civil Procedure, and may be by any means described in Supplemental Rule G(4)(a)(iv). Publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

Thus, as soon as a practical following the entry of a preliminary order of forfeiture in a criminal case, the Government should publish notice of the forfeiture in a manner consistent with the provisions of Supplemental Rule G(4)(a) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. As described in Rule G(4)(a)(iv), this may include publication on the Government's forfeiture website on the Internet (www.forfeiture.gov). The notice must describe the forfeited property, state the times under the applicable statute when a petition contesting the forfeiture must be filed, and the name and contact information for the government attorney to be served with the petition. The Government should also send direct written notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture of the property in the ancillary proceeding.

Rule 32.2(b)(6)(C) now specifically incorporates the exceptions to publication in Supplemental Rule G(4)(a)(i). Because Internet publication costs essentially nothing, prosecutors may determine to publish notice on the Internet in all criminal forfeiture cases rather than run the risk of challenges based on whether the value of the asset is actually below the \$1,000 threshold prescribed in Rule G(4)(a)(i)(A).³⁰

³⁰ Prior to enactment of the December 1, 2009, amendments to Rule 32.2, there was an argument that the mandatory language in 21 U.S.C. §853(n)(1) stating that the government "shall publish" notice of the forfeiture did not permit the Attorney General to dispense with publication, even in cases involving property worth less than \$1,000. Any argument that the mandatory language in §853(n)(1) permits no exceptions to publication is now eliminated by the specific reference in Rule 32.2(b)(6)(C) which incorporates the civil rule exceptions for low value assets. Title 28, United States Code, section 2072(b) provides, with respect to rules promulgated by the Supreme Court, "Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Thus, the rule trumps the statute. *See United States v. Marion*, 562 F.3d 1330, 1340, n.7 (11th Cir. 2009) ("to the extent it is argued that § 853 conflicts with Rule 32.2, the rule must trump. *See* 28 U.S.C. § 2072(b) ('All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.').").

VI. Preference for Federal Forfeiture

As a general rule, if property is seized as part of an ongoing federal criminal investigation and the criminal defendants are being prosecuted in federal court—or it is anticipated that a federal prosecution will be pursued—the forfeiture action should be commenced administratively by a federal agency or pursued in federal court regardless of whether a local, state, or federal agency made the seizure. Forfeitures should follow the prosecution for both legal and practical reasons. Parallel state forfeitures can jeopardize the pending federal criminal investigation or prosecution and create unnecessary confusion. Where federal resources are expended on an investigation and state and local law enforcement are assisting in a federal prosecution, federal forfeiture, administrative or judicial, should be pursued absent extraordinary circumstances. The efforts of state and local law enforcement should be recognized through formal equitable sharing rather than a division of assets between state and federal forfeiture.

However, certain circumstances may make state forfeiture appropriate. These circumstances include but are not limited to the following:

- (1) a state forfeiture is commenced on the seized asset before the federal agency joins the investigation and has either been concluded or substantial litigation has been conducted.
- (2) an existing memorandum of understanding sets forth a different procedure for the handling of the seizures and forfeitures.
- (3) the asset was seized by a state or local agency and state law requires a turnover order. A decision not to seek the turnover order must be coordinated with agency counsel and the federal prosecuting official; if an adverse order is entered by the state court, then agency counsel, the federal prosecuting official, and the local prosecuting attorney must participate in deciding how to proceed.³¹
- (4) the seized asset does not meet the Department of Justice's minimum monetary thresholds.
- (5) the pertinent federal prosecuting official has reviewed the case, declined to initiate forfeiture proceedings, and approved a referral for state forfeiture.

When a federal agency believes a state forfeiture is appropriate, the referral of an asset for state forfeiture must be discussed with agency counsel and the federal prosecuting official responsible for asset forfeiture.

If significant assets are referred for state forfeiture, without the prior consultation discussed above, after a determination to seek federal prosecution has been made, a federal prosecuting official may then decline to go forward with the federal prosecution.

If there is a state forfeiture related to a federal criminal prosecution, federal equitable sharing requests and decisions must take into account the entire case, and seizures should be reviewed before equitable sharing recommendations or decisions are made.

³¹ See Chap. 1, Sec. VII of this *Manual* for a full discussion of issues involving adoptive forfeitures. In particular, Sec. E discusses the policy favoring state forfeitures where the seizure is related to a purely state prosecution.

VII. Firearms Forfeiture Policy

This section provides a brief summary of policies bearing on the forfeiture of firearms. For further details on firearms forfeiture matters, prosecutors and law enforcement agencies should consult AFMLS.

A. Firearms are treated differently

Forfeited firearms and ammunition are treated differently from other types of forfeited property in several respects. As explained below, they are not shared with state and local law enforcement, they are not sold, and most often they are destroyed.

Forfeited firearms may be placed into federal official use by the U.S. Marshals Service (USMS) and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) or a federal investigative agency for such purposes as federal law enforcement use, ballistics testing, or display. USMS does not equitably share firearms with non-federal law enforcement agencies, and does not sell them. USMS policy and practice in this respect are consistent with those of ATF, Drug Enforcement Administration (DEA), Federal Bureau of Investigation (FBI), and the General Services Administration (GSA). In rare cases, firearms with specific, certain, and significant historical value are placed into official use for display purposes only by a non-participating federal agency, such as the Smithsonian Institution or one of the four U.S. military museums. USMS approves this type of official use only after the subject firearms have been rendered inoperable.

Minimum value and net equity thresholds do not apply to firearms. As explained in Chapter 1 of this *Manual*, the Department of Justice has established minimum monetary thresholds as to most types of property subject to federal seizure and forfeiture, and generally will not seize property for forfeiture, or adopt a state or local law enforcement seizure for federal forfeiture, unless the net equity in the seized property meets or exceeds these thresholds. There is an exception to the net equity thresholds where a particular forfeiture serves a compelling law enforcement interest. The Department has concluded that such a compelling interest applies to firearms and ammunition involved in crime. Therefore, unlike most forms of personal property, lawfully forfeitable firearms and ammunition may be, and should be, forfeited and adopted for forfeiture regardless of their monetary value.

There are at least two reasons for exempting firearms and ammunition from the minimum equity thresholds. Because cheap firearms used criminally cause harm the same as expensive ones, there is a strong law enforcement interest in removing both types from circulation. Moreover, as discussed below, the Federal Government generally destroys forfeited firearms and ammunition, and never resells them. Therefore, their potential resale value is simply irrelevant to the determination whether or not to forfeit them.

Unlike other types of forfeited property, federally forfeited firearms and ammunition *may not be sold*, except as scrap. Title 18, United States Code, section 3051(c)(3) provides, “*Notwithstanding any other provision of law*, the disposition of firearms forfeited by reason of a violation of *any law of the United States* shall be governed by the provisions of section 5872(b) of the Internal Revenue Code of 1986.” 18 U.S.C. § 3051(c)(3) (emphasis added). Section 5872(b) provides that no notice of public sale is required as to forfeited firearms *and that no forfeited firearm may be sold at public sale*. 26 U.S.C. § 5872(b). Although section 5872(b) permits forfeited firearms to be retained for *federal* official use, forfeited firearms are not transferred to state or local law enforcement agencies through equitable sharing or otherwise. Although section 5872(b) indicates that GSA could sell forfeited

firearms to state or local governments, GSA has determined that it will not do so. GSA's regulations provide that seized and forfeited firearms shall not be sold as firearms, but only as scrap "after total destruction." *See* 41 C.F.R. §§ 102-41.200, 102-42.1101-10(c). As a result, seized and forfeited firearms cannot be sold, and are generally destroyed.

Because sales of federally forfeited firearms are prohibited, prosecutors should take care not to enter into any agreement calling for the sale of forfeited firearms and the distribution of proceeds from any such sale. Because there can be no sale, there can be no proceeds—a fact that distinguishes forfeitures of firearms from forfeitures of most other types of property. Prosecutors should bring this prohibition on sale of forfeited firearms to the attention of the court whenever necessary to avoid entry of an order calling for such a prohibited sale. The overriding policy concern weighing against the sale or sharing of forfeited or abandoned firearms is that they may subsequently be resold and used in crime.

B. Preference for forfeiture

Forfeiture is the preferred way to dispose of crime-related firearms and ammunition. Forfeiture is most consistent with congressional intent, as reflected in the many specific and general forfeiture statutes that apply to firearms. Forfeiture proceedings also provide the best and clearest protections for the due process rights of firearms' owners, including the rights of innocent third parties who may have a lawful interest in firearms that have been stolen or otherwise used without the owners' knowledge and consent.

Although there are other lawful ways of disposing of crime-related firearms and ammunition in cases where forfeiture is not possible, including abandonment, non-forfeiture "quiet title" actions, and other equitable proceedings, *see, e.g., United States v. Howell*, 425 F.3d 971 (11th Cir. 2005), it is Department of Justice policy to subject seized crime-related firearms to formal forfeiture proceedings wherever possible.

Chapter 3: Settlements

I. General Policy

A. Scope

For purposes of this chapter, the term *settlement* includes the following:

- In a criminal forfeiture case:
 - (1) A plea agreement with a criminal defendant that includes a criminal case in which there is an agreement regarding the forfeiture of property; or
 - (2) An agreement to resolve a third party claim in the ancillary proceeding in a criminal case.
- In a civil forfeiture case, the resolution of a claim filed by any claimant in a civil forfeiture case, either before or after the judicial complaint is filed.

B. Principles

Settlements to forfeit property are encouraged to conserve the resources of both the United States and claimants in situations where justice will be served. The following principles must be observed when negotiating and structuring settlements.

B.1 Factual basis

There must be a statutory basis for the forfeiture of the property and sufficient facts stated in the settlement documents to satisfy the elements of the statute.

B.2 Consultation

All settlements must be negotiated in consultation with the seizing agency and the U.S. Marshals Service (USMS).¹ The seizing agency's input is essential in order to reach a settlement that is based on a common understanding of the facts and circumstances surrounding the seizure. Moreover, settlements occasionally require that administrative action be taken by the agency to implement those settlements, including, on occasion, a referral of the case back to the agency for administrative forfeiture of all or some of the seized property. Input from the USMS should always be sought to determine any current and prospective expenses to ensure that the settlement is fiscally sound from the Government's perspective and that ownership interests and title issues are adequately addressed in the settlement agreement allowing the USMS to carry out the terms of the settlement.

¹ In Treasury cases where the USMS is not the custodian of the property, the independent contractor will serve as the property manager, and the USMS need not be consulted. It is the responsibility of the seizing agency to contact the independent contractor and inform it of any settlement proposals.

B.3 Recovery of investigative and other costs

In general, the Government should not attempt to use a settlement to recover the costs of its investigation. It may be appropriate in unusual circumstances, however, to recover extraordinary expenditures, such as funds needed to clean up environmental damage to the forfeited property.

B.4 Status of administrative forfeiture

Before discussing any settlement, the Assistant U.S. Attorney (AUSA) and the investigating agent must determine what property, if any, is presently being processed for administrative forfeiture or has previously been declared administratively forfeited. AUSAs may not reach agreements with defendants or their counsel in a criminal case regarding the return of property that is the subject of a pending administrative forfeiture proceeding without first consulting the seizing agency.² Property that has been administratively forfeited belongs to the Government and, therefore, cannot be returned to a defendant or used to pay restitution or other obligations of the defendant as part of a plea agreement.

B.5 Disagreements

If the seizing agency or the USMS disagrees with the U.S. Attorney's recommended settlement proposal, it may refer the matter to the Chief of the Asset Forfeiture and Money Laundering Section (AFMLS) for resolution.

B.6 Property located in another district

To settle a forfeiture action involving property located in another judicial district, the U.S. Attorney's Office (USAO) handling the forfeiture must notify and coordinate with the USAO and the USMS in the district where the property is located. It is the responsibility of the USAO in the district that forfeits property located in another district to comply with the requirements for forfeiture in the district where the property is located. Failure to comply with such requirements may result in a cloud on the Government's title that may interfere with the disposal of assets in accordance with settlement terms; coordination will minimize this possibility.

B.7 Global settlements

The Government may conclude a civil or administrative forfeiture action in conjunction with the resolution of the criminal charges involving the same activity that gave rise to the forfeiture of the property. The following principles should be observed in negotiating such a global settlement:

- (1) The Government should *not* agree to release property subject to forfeiture (civil or criminal) in order to *coerce* a guilty plea on the substantive charges, nor should the Government agree to dismiss criminal charges in order to *coerce* a forfeiture settlement.³

² There have been instances in which AUSAs have arranged plea agreements providing for the disposition of administratively forfeitable property without consulting the appropriate seizing agency. There also have been instances in which AUSAs have agreed to return to a defendant property that has already been forfeited administratively. Such agreements are improper and arrangements cause great difficulty for the seizing agencies.

³ See also Chap. 11, Sec. V of this *Manual*.

- (2) To the maximum extent possible, the criminal plea and forfeiture should conclude the defendant's business with the Government. Delaying consideration of the forfeiture until after the conclusion of the criminal case unnecessarily extends the Government's involvement with the defendant and diminishes the effectiveness and efficiency of forfeiture enforcement.
- (3) If a plea agreement in a criminal case does not resolve the criminal forfeiture or a related civil forfeiture case, express language to this effect should be included in the plea agreement so as to remove any doubt or ambiguity on this point.
- (4) Where a defendant who is also a claimant in a related civil forfeiture action has negotiated a plea agreement in the criminal case and concurrently wishes to forfeit the property in the related civil forfeiture action, the plea agreement should state that the claimant/defendant is waiving any and all rights—constitutional, statutory, or otherwise—with respect to the forfeiture.⁴ Any civil settlement should be documented independently of the plea agreement and should include the following information:
 - (a) The claimant/defendant's interest in the property;
 - (b) An admission of the facts supporting forfeiture;
 - (c) That the claimant/defendant forfeits all rights to the property; and
 - (d) That he or she waives any and all right to contest the forfeiture of the property.
- (5) The defendant, in the plea agreement, must admit to facts sufficient to support the forfeiture. The Government, however, should expressly reserve its right to reopen the civil forfeiture action in the event it is later determined that the settlement was based on false information or where the defendant violates the plea agreement or the agreement is invalidated for any other reason.

B.8 Partial payments

Settlements shall not provide for partial payments, except upon the advice and approval of AFMLS in consultation with the USMS, Headquarters Asset Forfeiture Division.⁵

B.9 Reacquiring the property

The settlement should state that the claimant/defendant may not reacquire the forfeited property directly or indirectly through family members or any other agent. Family members who already own a partial interest in the forfeited property may, however, purchase the forfeited interest with legitimate funds.

B.10 Effect on taxes and other obligations

Settlement documents should clearly state that the terms of the settlement, unless specified, do not affect the tax obligations, fines, penalties, or any other monetary obligations of the claimant/defendant owed

⁴ To the extent that the defendant is preserving any rights, exceptions should be explicitly expressed and the rights observed should be identified.

⁵ In Treasury and Homeland Security cases, the advice and approval of AFMLS should also be sought.

to the Government. Under no circumstances will the settlement document allow forfeitable proceeds to settle the defendant's tax obligations without the prior approval of the Internal Revenue Service (IRS).

USAOs are obligated pursuant to 28 U.S.C. § 547(4) to "institute and prosecute proceedings for the collection of fines, penalties, and forfeitures incurred for violation of any revenue law, unless satisfied on investigation that justice does not require the proceedings." Therefore, in order that appropriate actions may be taken when a proposed forfeiture settlement will release assets to a claimant/defendant who is known or likely to have other outstanding obligations to the United States (e.g., taxes), AUSAs should routinely notify the appropriate agency (e.g., IRS) of the proposed settlement.

The Debt Collection Improvement Act of 1996 (DCIA) requires the Department of the Treasury and other disbursing officials to offset federal payments to collect delinquent non-tax debts owed to the United States and to collect delinquent debts owed to states. The Treasury Offset Program (TOP) is designed to offset payments related to the DCIA. Accordingly, settlements should also notify the claimant/defendant that any funds currently on deposit in the Seized Asset Deposit Fund or Assets Forfeiture Fund will have to be processed through TOP before being returned to the claimant/defendant, with the possibility that any of the claimant/defendant's outstanding and delinquent obligations to the federal or a state government might be offset against the payment.

II. Authority of the U.S. Attorney to Enter Into a Settlement

The authority of the U.S. Attorney to settle a forfeiture matter is circumscribed by Attorney General Order No. 1598-92, which, *inter alia*, authorizes the Assistant Attorney General for the Criminal Division to re-delegate the maximum amount of his settlement authority to U.S. Attorneys. Accordingly, the Assistant Attorney General for the Criminal Division may re-delegate to U.S. Attorneys up to \$1 million to settle civil and criminal cases, subject to the approval of the Deputy Attorney General. 28 C.F.R. §§ 0.168(b), (d). Pursuant to that authority, the Assistant Attorney General for the Criminal Division has delegated, with the approval of the Deputy Attorney General, the following settlement authority to U.S. Attorneys.⁶

- (1) Except as provided in section IX of this chapter, U.S. Attorneys have the authority to settle any civil or criminal forfeiture case in which the amount involved does not exceed \$1 million, regardless of the amount to be released to the claimant or defendant; or
- (2) Except as provided in section IX of this chapter, U.S. Attorneys also have the authority to settle any civil or criminal forfeiture case in which the amount involved is between \$1 million and \$5 million, if the amount to be released to the claimant or defendant does not exceed 15 percent of the original claim. The maximum settlement under the second scenario is at \$750,000, which is 15 percent of \$5 million.
- (3) In all other cases, the U.S. Attorney must obtain approval of the settlement from AFMLS.

For the purposes of this provision, the term *amount involved* is defined as follows:

⁶ See Attorney General Order No. 1598-92, Appendix Subpart Y, Part O, Title 28, Code of Federal Regulations, establishing the settlement and compromise authority redelegated to the U.S. Attorneys from the Assistant Attorney General, Criminal Division, in accordance with the requirements of 28 C.F.R. § 0.168(d).

- (1) In a civil forfeiture case, the *amount involved* is the fair market value of the interest claimed by the person with whom the Government is attempting to reach a settlement. If the person is claiming an interest in more than one asset, the amount involved is the aggregate of those interests. For example, if the defendant property is a dwelling with a fair market value of \$1.2 million, and the claimant is a lienholder asserting a \$400,000 lien, for purposes of reaching a settlement with the lienholder the amount involved is \$400,000. In the same case, if the claimant is the owner who acknowledges the validity of the lien but is contesting the forfeiture of the equity in the property, for purposes of reaching a settlement with the owner the amount involved is \$800,000. But if the claimant is the owner who is also contesting the forfeiture of three other assets with a combined value of \$350,000, the amount involved would be \$1.15 million.
- (2) In a criminal forfeiture case, the *amount involved* is the fair market value of the defendant's interest in the aggregate value of any property that has been seized, restrained, or specifically identified as property subject to forfeiture in any forfeiture count, allegation, or bill of particulars, including substitute assets, but does not include the amount of a money judgment to the extent that there are no known assets available to satisfy the judgment. For example, if the Government has seized several assets and restrained other assets for the purpose of forfeiture in connection with a criminal prosecution, and has also alleged in the indictment that the defendant is liable for a \$2 million money judgment, for purposes of negotiating a plea agreement with the defendant the amount involved is the aggregate value of the defendant's interest in all the assets that have actually been seized or restrained, but would not include the \$2 million unless it appears that there are assets currently available that may be forfeited in satisfaction of the judgment.
- (3) In the ancillary proceeding in a criminal case, the *amount involved* is the fair market value of the interest in the forfeited property that is claimed by the third party with whom the Government is attempting to reach a settlement.

The *amount to be released* means the value of the property that a claimant, defendant, or third party in an ancillary proceeding would recover or would be permitted to retain.

III. Authority of AFMLS to Approve a Settlement

The Chief of AFMLS⁷ has the authority to approve any settlement in which the amount involved is less than \$2 million and the amount being returned is less than 15 percent of the amount involved. If the amount to be released exceeds 15 percent of the amount involved *and* is more than \$2 million, the settlement must be approved by the Deputy Attorney General.⁸

AFMLS considers four basic criteria in determining whether a settlement is appropriate: (1) whether the litigation risks justify the settlement; (2) whether the settlement employs forfeiture best practices and is consistent with overall Department goals; (3) whether the proposed settlement

⁷ The authority of the Assistant Attorney General pursuant to 28 C.F.R. § 0.160 for settlement of forfeiture cases is delegated to the Chief, AFMLS, Criminal Division, by paragraph (c) of Attorney General Order No. 1598-92.

⁸ This policy is based on 28 CFR §§ 0.160 and 0.161. Section 0.160 provides that "Assistant Attorneys General are authorized, with respect to matters assigned to their respective divisions, to: (1) Accept offers in compromise of claims asserted by the United States in all cases in which the difference between the gross amount of the original claim and the proposed settlement does not exceed \$2 million or 15 percent of the original claim, whichever is greater." Section 0.161 provides that matters that cannot be approved at the Criminal Division level must be approved by the Deputy Attorney General.

is made merely to induce a criminal plea; and (4) whether, in cases involving complex assets, the economic analysis is sound.

A. Examples

- (1) The Government brings a civil forfeiture action against an asset with a market value of \$1.5 million but in which the sole claimant has only \$250,000 in equity. The Government agrees to abandon the forfeiture and release the entire asset to the claimant. Because the total value of the equity involved is less than \$1 million, the U.S. Attorney has authority to approve the settlement.
- (2) The Government files a civil forfeiture action against seized bank accounts and currency in the amount of \$1.8 million, but agrees as part of a settlement to release 20 percent (\$360,000) to the claimant. Because the total value of the property exceeds \$1 million, the U.S. Attorney does not have authority to settle the case without approval from the Department of Justice; but because the amount to be returned does not exceed \$2 million, the Chief of AFMLS would have the authority to approve the settlement without having to consult with the Deputy Attorney General, even though the amount to be returned is more than 15 percent of the total value.
- (3) A criminal indictment alleges that the defendant must forfeit, upon conviction, various assets in which the defendant has a total equity of \$3 million. The assets are neither seized nor restrained, but are listed in the forfeiture allegation in the indictment. As part of a plea agreement, the Government agrees not to go forward with the forfeiture of most of the assets but instead agrees to accept a lump sum payment of \$750,000 in lieu of forfeiture. Because the defendant is being allowed to retain assets worth more than \$2 million and representing more than 15 percent of the total value of the property subject to forfeiture, the plea agreement must be approved by the Deputy Attorney General.

IV. Using Administrative Forfeiture to Effect a Settlement

The following procedures apply to settlement agreements in civil judicial forfeiture cases and to criminal forfeiture plea agreements where an administrative forfeiture is necessary to effectuate the agreement. In such cases, the headquarters of the seizing agency involved must be consulted by the USAO prior to finalizing an agreement in order to ensure the agency can accommodate the terms of the agreement. The Department of Justice's policy is to pursue an agreed upon administrative forfeiture where it is possible and economically efficient to do so.

A. Settlement of forfeiture after a claim is filed in an administrative forfeiture proceeding, but before a judicial complaint is filed

The following requirements must be met where a claim has been filed in response to a notice of administrative forfeiture and the case has been referred to the U.S. Attorney, but a settlement is reached before a civil judicial complaint is filed.

- (1) The terms of the settlement should be reduced to writing by the U.S. Attorney and include the following:

- (a) A provision whereby the claimant/defendant identifies his or her ownership interest in the property to be forfeited;
 - (b) A provision whereby the claimant/defendant gives up all of the right, title, and interest in the property so identified;
 - (c) A provision whereby the claimant/defendant agrees not to contest the Government's administrative forfeiture action and waives all deadlines under 18 U.S.C. § 983(a);
 - (d) A provision whereby the claimant/defendant agrees and states that the property to be forfeited administratively was connected to the illegal activity as proscribed by the applicable civil forfeiture statute (e.g., money to be forfeited is in fact proceeds from illegal drug trafficking);
 - (e) Specific reference to the withdrawal of the claim; and
 - (f) A "hold harmless" provision and a general waiver of Federal Tort Claims Act rights and *Bivens* actions, as well as a waiver of all constitutional and statutory defenses and claims.
- (2) The case should promptly be referred back to the seizing agency to reinstitute the administrative process. The seizing agency shall reinstitute the administrative forfeiture process to effectuate the agreement upon receipt of a referral in compliance with this policy, consistent with its lawful authority.

Where the agreement provides for the claimant to withdraw the claim to all property subject to forfeiture, the entire case will be referred back to the agency for administrative forfeiture unless, of course, other claims have been filed as to the same property.

Where the agreement provides for the claimant to withdraw only a part of a claim, the case will be referred back to the agency for administrative forfeiture of that portion of the forfeitable property named in the agreement, and the agency may release the remainder to the claimant consistent with the settlement.

Republication of the notice or of the administrative forfeiture action is not necessary, provided publication covering the property to be forfeited occurred prior to the filing of the claim.

B. Settlement of civil judicial forfeiture without prior administrative action

The following requirements must be met where the judicial action was commenced without a prior administrative forfeiture action, and a settlement agreement has been reached involving a proposed administrative forfeiture of seized property.

- (1) The headquarters of the seizing agency must concur in that part of the settlement that would obligate the agency to commence administrative forfeiture proceedings;
- (2) The complaint must be dismissed or amended so as to strike the assets to be administratively forfeited; and
- (3) The jurisdiction of the district court over the assets to be administratively forfeited must be relinquished before referral may be made to a seizing agency under this policy.

The seizing agency shall initiate the administrative forfeiture process to effectuate such an agreement upon receipt of a referral in compliance with this policy, consistent with its lawful authority.

C. Using administrative forfeiture to settle a criminal forfeiture action

In cases where property has been seized or restrained for forfeiture under criminal statutes, and an agreement relating to a proposed administrative forfeiture of the property has been reached between the U.S. Attorney and the claimant/defendant prior to entry of a preliminary order of forfeiture against the defendant's interest in the subject property,

- (1) The headquarters of the seizing agency must concur in that part of the settlement that would obligate the agency to commence administrative forfeiture proceedings;
- (2) The seizure or restraining orders must be dismissed or vacated as to the property to be administratively forfeited; and
- (3) The jurisdiction of the district court over the property to be administratively forfeited must be relinquished. The seizing agency shall initiate the administrative forfeiture process to effectuate such an agreement upon receipt of a referral in compliance with this policy, consistent with its lawful authority.

V. References to the Remission or Restoration Processes in Settlements

No agreement—whether a settlement in a civil judicial action, or a plea agreement resolving both criminal charges and the forfeiture of assets in a criminal case, or settlement of a claim in an ancillary proceeding—may contain any provision binding the Department of Justice and the agencies to a particular decision on a petition for remission or request for restoration, or otherwise contain terms the effectiveness of which is contingent upon the making of such a particular decision. The remission and restoration processes, like the pardon process in criminal cases, are completely independent of the litigation and case settlement process.

AFMLS, however, in appropriate cases upon request, will adjudicate a properly filed petition for remission or mitigation prior to the negotiation of a forfeiture settlement or entry of a final order of forfeiture. It is proper to include in a settlement agreement a provision that expressly leaves open or expressly forecloses the right of any party to file a petition for remission or mitigation.

VI. Settlements in Civil Judicial Forfeiture Cases

Any settlement that purports to forfeit property binds only the parties to it and forfeits only the interest in the property that the settling claimant possesses. The following procedures must be followed to ensure that a valid and complete civil judicial forfeiture of the interest occurs through the settlement occurs:

- (1) A civil verified complaint for forfeiture of the property must be filed in the U.S. district court to establish the court's jurisdiction. Filing an action as a "miscellaneous docket" and other attempts to shortcut the process will not be recognized as a valid forfeiture;
- (2) All known parties in interest must be given written notice, and notice by publication must be made;

- (3) If no timely claim has been filed pursuant to the Supplemental Rules for Certain Admiralty or Maritime and Asset Forfeiture Claims, a default judgment pursuant to Fed. R. Civ. P. 55 must be sought as to all interests in the property other than the interest(s) subject to the settlement agreement; and
- (4) Proposed orders of forfeiture should fully incorporate the terms of all settlement agreements (such as any lien or mortgage per diem rates and payoffs, spousal ownership interests, etc.).

VII. Plea Agreements Incorporating Criminal Forfeiture

In any plea agreement, a defendant may only consent to the forfeiture of his or her interest in the property. Forfeiture of the defendant's interest in property held by nominees can proceed criminally, but the potential for an ancillary claim by the nominee must be anticipated. A plea agreement that purports to forfeit the property may only bind the parties thereto and transfers only the interest that the settling claimant/defendant possesses.

The following procedures must be followed to ensure that a valid forfeiture results from a plea agreement:

- (1) There must be a forfeiture count or allegation in the indictment or information; otherwise, forfeiture is legally impossible. To the extent property is known to be subject to forfeiture, it should be listed in the indictment, information, or in a subsequent bill of particulars. The USAO must ensure that its criminal pleadings are in compliance with Rule 32.2 of the Federal Rules of Criminal Procedure;
- (2) The U.S. Attorney must comply with the requirements applicable to third party interests (e.g., 21 U.S.C. §§ 853(n)(1)-(7)), and the provisions of Rule 32.2 of the Federal Rules of Criminal Procedure, including affording third parties with notice of the forfeiture and of their right to obtain an post-conviction adjudication of their interests in the property;
- (3) The settlement to forfeit property must be in writing, and the defendant must expressly stipulate to all facts supporting the forfeiture and waive all statutory and constitutional defenses to the forfeiture;⁹
- (4) The court must issue a preliminary order of forfeiture that incorporates the settlement and must include the forfeiture order in the oral pronouncement of the sentence in the presence of the defendant and in the written judgment of conviction at sentencing; and
- (5) Wherever possible, in order to avoid protracted litigation of ownership issues in the context of ancillary hearings, the United States should agree to accept unencumbered property only, with the exception of valid financial institution liens, or at the very least, the plea agreement should require the defendant to convey clear title to the Government.¹⁰ Short of this, the Government should seek to obtain from the settling defendant, as part of the plea agreement, sworn factual stipulations that may be useful against any non-pleading codefendants who might assert an interest in the same property in the "forfeiture phase" of the criminal prosecution or any claims that might be filed by third parties as to the same property in either the ancillary proceeding or any parallel civil forfeiture action.

⁹ To the extent that the defendant is preserving any rights, exceptions should be explicitly expressed and the rights observed should be identified.

¹⁰ See also Sec. IV.A of this chapter.

VIII. Acceptance of a Monetary Amount in Lieu of Forfeiture of Other Tangible Property

A. Introduction

The Government may accept and agree to replace directly forfeitable property that has been seized with an agreed amount of money in lieu of seized forfeiture and then proceed to forfeit the sum of money under the same legal theory that applied to the directly forfeitable property. The Government, with court approval, may do the same. In a judicial forfeiture case, with court approval, the Government may also accept and forfeit an agreed amount of money even as to directly forfeitable property, including real estate, that has not been seized. However, the replacement of directly forfeitable property with a sum of money should be done only when the interests of justice so require and subject to the limitations set forth below which are imposed as a matter of policy, not as a statutory requirement.

Accepting and forfeiting a sum of money in place of directly forfeitable property and releasing the forfeitable latter property effectively moots any unsettled forfeiture claims against the released property. It is imperative, therefore, that *all* interests in the property be resolved before the property is released.

B. Policy considerations

The many federal forfeiture statutes reflect congressional policy that property constituting or derived from criminal proceeds and property used to commit crime should be taken away from those who took it from victims or illicit customers, committed crimes with it, or let others use it to commit crime. Forfeiting the “tainted” property itself accomplishes this goal more directly and clearly than forfeiting an agreed sum of money while leaving the “tainted” property itself in the hands of those whose acts or failures to act made it forfeitable. Thus, Department of Justice policy is to forfeit all available directly forfeitable property rather than a replacement sum of money unless the interests of justice clearly favor forfeiture of the replacement sum of money.

There are, for example, limited circumstances where accepting and forfeiting an amount of money in lieu of the property directly linked to an underlying offense is in the interests of justice, such as cases where innocent owners own all but a small portion of the property, where forfeiture of the particular property will cause an undue hardship on innocent owners, and where, after balancing the costs and risks of continued litigation, the Government determines that settling for part of the value of allegedly forfeitable property is just and appropriate.

The following discussion of accepting money in lieu of forfeitable property is limited *solely* to cases where the directly forfeitable property is available for forfeiture, and forfeiting a replacement sum of money will leave the directly forfeitable property in the hands of some or all of its present owners. The policy concerns discussed in this section do not arise when the Government either (1) forfeits substitute assets in a criminal case under 21 U.S.C. § 853(p) because directly forfeitable property is unavailable because of some act or omission of a criminal defendant, or (2) sells property, either before or after forfeiture, to persons not involved in or associated with the underlying criminal activity.

C. Applicable procedures

The following procedures must be followed when the Government accepts and forfeits money in lieu of other property:

- (1) **Administrative forfeitures.** 19 U.S.C. § 1613(c), as incorporated by, e.g., 18 U.S.C. § 981(d), 21 U.S.C. §§ 853(j), 881(d), permits federal seizing agencies, as a form of relief from administrative forfeiture, to accept and forfeit a sum of money in lieu of directly forfeitable seized property. See also 19 U.S.C. § 1614. As a matter of policy and discretion, however, the Drug Enforcement Administration (DEA) and the Federal Bureau of Investigation (FBI) limit their use of this authority to cases where such substitution is determined to be in the interests of justice and a timely claim for the forfeitable property has been filed pursuant to 18 U.S.C. § 983(a)(2) and referred by the seizing agency to the USAO for initiation of judicial forfeiture proceedings. After consultation with the seizing agency (see Section I.B.2), the USAO may accept a monetary amount in lieu of forfeiture of the seized property and refer the matter back to the seizing agency to effect the settlement (see Section IV).
- (2) **Judicial forfeitures.** In a judicial forfeiture case, with court approval, and pursuant to an appropriate order of forfeiture, the Government may, with court approval and subject to an appropriate order of forfeiture, accept and forfeit an agreed sum of money in lieu of directly forfeitable property. This is true regardless of whether or not the directly forfeitable property has been seized.

D. Discussion

When it is in the interests of justice, the Government may forfeit a sum of money in place of directly forfeitable property or a directly forfeitable partial interest in otherwise non-forfeitable property. Parties often agree to substitute forfeiture of a sum of money in place of directly forfeitable property in connection with a settlement. When courts order an interlocutory sale of forfeitable property, by agreement or otherwise, the net sale proceeds also typically become a substitute res in a civil forfeiture proceeding or a replacement for directly forfeitable property in a criminal forfeiture proceeding. Legal authority to forfeit money in lieu of other property is found in the applicable statutes, rules, regulations, and case law summarized below.

Subject to any applicable regulations¹¹ and the policy restrictions described herein, which have been imposed as a matter of policy, an agency in an administrative forfeiture proceeding may accept and forfeit a sum of money in lieu of directly forfeitable property that has been seized. The authority for doing this is found under 19 U.S.C. § 1613(c), which terms such replacement as a form of “relief” from the forfeiture, and under 19 U.S.C. § 1614, which authorizes agencies to release property seized for administrative forfeiture upon payment of “the value of” such property. These statutes specify that the replacement sum of money is “treated in the same manner as the proceeds of sale of a forfeited item.” 19 U.S.C. § 1613(c).

The customs laws, including sections 1613(c) and 1614, are incorporated by reference into most civil and criminal forfeiture statutes. *See, e.g.,* 18 U.S.C. § 981(d), 21 U.S.C. §§ 853(j), 881(d).

¹¹ Payments in lieu of forfeiture are addressed in the proposed Department of Justice regulations (28 C.F.R. § 8.12(e)).

Therefore, sections 1613(c) and 1614 also authorize forfeiture of a sum of money in place of directly forfeitable property that has been seized in most judicial forfeiture cases, although, of course, in judicial forfeiture cases, both the replacement of money for the directly forfeitable property with the sum of money and the forfeiture of the replacement sum of money require the court's approval. *See, e.g., United States v. Approximately 64,695 Pounds of Shark Fins*, 353 F. Supp. 2d 1095, 1098-99 (S.D. Cal. 2005) (court permitted claimant to post bond as substitute res in exchange for release of seized shark fins, which claimant was then permitted to sell).

Although section 1613(c) and section 1614 apply by their terms only to "seized" property, substituting and forfeiting an agreed amount of money in lieu of directly forfeitable property has not been so limited. Courts have recognized, generally without reference to particular statutory authority, that parties to a forfeiture case may agree to replace the directly forfeitable property with a sum of money, and then may settle or litigate the forfeiture on the same legal theory that applied to the directly forfeitable property, with the money serving as substitute res. In *Republic National Bank of Miami v. United States*, 506 U.S. 80, 82-83 (1992), the Court noted, without comment, that by agreement and with court approval, forfeitable real property had been sold and the proceeds treated as a substitute res. In *Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 424 F.3d 852, 855 (9th Cir. 2005) (a private in rem action to enforce a lien on vessels), the court, like the Supreme Court in *Republic National Bank*, assumed it was proper to replace substitute money for the defendant vessels with a sum of money and a bond, and focused instead upon whether the district court lost in rem jurisdiction when the substitute replacement money and bond were transferred out of the district after the claimants prevailed in the district court.¹²

Similarly, in *United States v. Real Property Located at 22 Santa Barbara Drive*, 264 F.3d 860, 866-67 (9th Cir. 2001), the forfeitable real property was sold in 1991, the proceeds became a substitute res, and litigation over a variety of issues—but never the propriety of the substitution—continued for another ten years. In *United States v. An Article of Drug Consisting of 4,680 Pails*, 725 F.2d 976, 983 n.20 (5th Cir. 1984), which focused upon whether the district court lost jurisdiction when seized animal drug powder was mistakenly released and then removed from the district, the court of appeals described selling forfeitable property and using the sale proceeds as a "substitute res for jurisdictional purposes" as "an often-used and legitimate practice." *See also United States v. Twelve Pieces of Real Property*, 54 F. App'x 461, 463-64 (9th Cir. 2003) (affirming forfeiture of money that replaced facilitating real property in a drug trafficking case); *United States v. \$180,893.00*, 39 F. App'x 570, 571-73 (same); *United States v. 250 Lindsay Lane*, 2005 WL 1994762 at *5 (W.D. Ky. Aug. 16, 2005) (by agreement, proceeds from sale of real property allegedly purchased with healthcare fraud proceeds became substitute res); *United States v. \$1.5 Million Letter of Credit as a Substitute Res for Seized Bank Accounts*, 1992 WL 204357 at *2 (S.D.N.Y. Aug. 7, 1992) (by stipulation, parties substituted \$1.5 million letter of credit for approximately \$4.3 million contents of seized bank accounts); *United States v. An Article of Drug Consisting of 4,680 Pails*, 725 F.2d 976, 983 n.20 (5th Cir. 1984) (dictum describing the pre-judgment sale of forfeitable property and use of the sale proceeds as a "substitute res for jurisdictional purposes" as "an often-used and legitimate practice;" citation omitted).

¹² Both the Ninth Circuit in *Ventura Packers*, 424 F.3d at 864, and the Supreme Court in *Republic National Bank*, 506 U.S. at 92-93, held that transferring the "substitute res" out of the district did not deprive the district courts of in rem jurisdiction.

In addition to the common law, there is statutory authority for substitution in many cases. In all criminal forfeitures, and most civil forfeitures, courts have broad power to take any action necessary to preserve the forfeitable value of property. *See* 21 U.S.C. § 853(e)(1); 18 U.S.C. § 983(j)(1). Liquidation of the property, replacing it with a sum of money, is often an effective means of preserving forfeitable value. In criminal forfeitures, substitution of money for tainted property is authorized under the substitute assets provision, 21 U.S.C. § 853(p), if the defendant has transferred or commingled interests in directly forfeitable property in a way that makes liquidation and forfeiture of the property itself difficult.

Particularly in criminal forfeiture cases, it is important that counsel refer to the replacement sum of money as “cash in lieu” and not as a “substitute asset.” The phrase “substitute asset” is a term of art referring to substitute property forfeitable under 21 U.S.C. § 853(p) and 18 U.S.C. § 1963(m). “Substitute assets” are legitimate assets that are subject to forfeiture in place of directly forfeitable property that has been made unavailable for forfeiture solely because of some act or omission of the criminal defendant. Purely as a matter of statutory construction, such “substitute assets” may not be restrained or seized in most jurisdictions prior to the conviction of the criminal defendant. By contrast, “cash in lieu” is a sum of money that replaces directly forfeitable property prior to forfeiture, either by consent of the parties and/or court order, does not replace property that has been made unavailable for forfeiture by some act or omission of the defendant. Rather, it replaces directly forfeitable property that is currently available and does so by consent and/or court order; thus, the replacement sum of money should be subject to restraint and seizure the same as the directly forfeitable property it replaces.

In civil judicial forfeiture cases, interlocutory sales are specifically authorized by Supplemental Rule G(7)(b), which provides that the sale proceeds “are a substitute res subject to forfeiture in place of the property that was sold.” Supp. Rule G(7)(b)(iv). Rule G(7)(b) codified preexisting law approving the practice of treating interlocutory sale proceeds as a substitute res under Supp. Rule E(9)(b). *See United States v. One Parcel Lot 41, Berryhill Farm*, 128 F.3d 1386, 1390 (10th Cir. 1997) (interlocutory sale of residence while civil case was stayed pending criminal trial avoided waste and expense and allowed Government to satisfy mortgage); *United States v. Haro-Verdugo*, 2006 WL 1990843, at *2 (D. Ariz. 2006) (magistrate judge recommended interlocutory sale under Supp. Rule E(9)(b) where transient drug dealers were using vacant property and property was deteriorating); *United States v. 2540 Chadwick Way*, 2005 WL 2124539, at *3 (N.D. Ill. 2005) (over claimant’s objection, court ordered interlocutory sale of real property pursuant to section 983(j) to avoid mortgage foreclosure); *Aguilar v. United States*, 1999 WL 1067841, at *5 (D. Conn. 1999) (despite claimant’s objection, exigent circumstances justified interlocutory sale of real property to prevent vandalism and to pay off mortgage). *See generally* AFMLS’ *Guide to Interlocutory Sales and Expedited Settlement*.

Under many forfeiture statutes, the proceeds from sale of forfeitable property are directly forfeitable without the need for formal “substitution” because the scope of direct forfeiture under such statutes is “derived from” or “traceable to” the forfeitable property. *See, e.g.*, 18 U.S.C. § 981(a)(1)(A) (authorizing forfeiture of property traceable to property “involved in” money laundering which includes any property traceable to otherwise forfeitable property); 18 U.S.C. § 981(a)(1)(C) (property derived from “traceable to” property constituting the proceeds of any “specified unlawful activity” proceeds); 21 U.S.C. § 881(a)(6) (property traceable to drug proceeds). “Substitution” of untainted property for forfeitable property is only necessary in the interlocutory sale context where the proceeds

from sale of forfeitable property are not themselves directly subject to forfeiture. *See, e.g.*, 21 U.S.C. § 881(a)(7) (authorizing forfeiture of facilitating real property, but not of property derived from or traceable to such property).

In judicial forfeiture cases, the Government should request that any interlocutory order substituting money for a forfeitable asset direct the USMS or the appropriate Treasury agency or other property custodian to accept and hold the money, after paying any expenses incurred with respect to the seizure and maintenance of the asset being liquidated or released, pending further orders of the court. Once a substitute res has been forfeited, the USMS or the appropriate Treasury agency must dispose of it in the same manner as other forfeited property.

IX. Agreements to Exempt Attorneys' Fees from Forfeiture

Any agreement to exempt an asset from forfeiture so that it can be transferred to an attorney as fees must be approved by the Assistant Attorney General for the Criminal Division.¹³

¹³ *See United States Attorneys' Manual* § 9-120.116.

Chapter 4: Qui Tam Actions

I. Payment of a Relator's Share

A. Overview of the False Claims Act

The False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, imposes civil liability on any person who submits a false or fraudulent claim to the Government. An action may be filed by the Attorney General, or by a private person on behalf of the United States. *Id.* § 3730(a)-(b); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 769-78 (2000). An action filed by a private person is known as a *qui tam* suit, and the private party filing the action is referred to as the *relator*. The United States can intervene in and take over the litigation of a *qui tam* suit, or permit the relator to pursue the *qui tam* suit on his or her own. *Id.* § 3730(b)(4). If the *qui tam* suit is successful, the United States recovers the judgment and pays part of it to the relator. The relator's share of any recovery depends, in part, on whether the United States intervenes in the action. *Id.* § 3730(d)(1)-(2).¹

The FCA permits the relator to object to a settlement of the relator's claim. 31 U.S.C. § 3730(c)(2)(B). However, the United States may settle notwithstanding a relator's objection if the court determines after a hearing that the settlement is "fair, adequate, and reasonable." *Id.*

In addition, the FCA provides that in *qui tam* suits the United States "may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty." *Id.* § 3730(c)(5). The FCA further provides that "the person initiating the action shall have the same rights in such proceeding as such person would have if the action had continued under this section." *Id.*

The purpose of this "alternate remedy" provision is to provide the United States with maximum flexibility to choose the best forum for pursuing its fraud claims against the defendant. *See* S. Rep. 99-345, 99th Cong., 2d Sess. 27, *reprinted in* 1986 U.S.C.C.A.N 5266, 5292. Thus, the alternate remedy provision authorizes the United States to stay the relator's FCA action, and choose instead to pursue its fraud claims against the defendant through an alternative proceeding. *Id.* Congress envisioned that the alternative proceeding would be in lieu of the relator's action under the FCA. *Id.* ("While the Government will have the opportunity to elect its remedy, it will not have an opportunity for dual recovery on the same claim or claims.") To ensure that the relator is not prejudiced in the event the United States pursues an alternate remedy, the relator is granted the same rights in the alternative proceeding that he or she would have had in her civil action under the FCA, including the right to participate in the proceedings, to object to any settlement of the proceeding, and to receive a share of any recovery.

¹ Under the FCA, a relator is entitled to between 15 and 25 percent of the proceeds of the action if the United States intervenes in the action, and to between 25 and 30 percent of the proceeds if the United States does not intervene. 31 U.S.C. § 3730(d)(1) and (2).

B. Forfeiture proceedings as alternate remedies

The Department's view is that a forfeiture proceeding does not qualify under the FCA as an alternate remedy giving rise to a relator share.² The principal basis for this view is that the alternate remedy provision encompasses only those proceedings that are properly viewed as a substitute for the relator's civil claims under the FCA. Thus, the alternate remedy provision is limited to alternative proceedings to redress the submission of false or fraudulent claims, and does not extend to forfeiture or other criminal proceedings that do not serve as a substitute for such claims.

Three district courts have considered the question of whether a criminal proceeding qualifies as an alternate remedy under the FCA. In *United States v. Lustman*, 2006 WL 1207145 (S.D. Ill. May 4, 2006), the court rejected the relators' motion to intervene in, and obtain a share of the proceeds of, a criminal proceeding instituted against one of the defendants named in their *qui tam* action. As part of that criminal proceeding, the defendant was ordered to pay restitution. The court concluded that the alternate remedy provision did not encompass criminal proceedings. The court also concluded that the relators' motion was moot, because the restitution paid by the defendant had already been disbursed.

In *United States ex rel. Oehm v. National Air Cargo, Inc. et al.*, No. 05-CV-242S (W.D.N.Y. Feb. 15, 2008), the United States executed a global settlement with the defendant that resolved the FCA claims as well as separate criminal and civil forfeiture proceedings. The court rejected the relator's request for a share of the global settlement attributable to the criminal and civil forfeiture proceedings, reasoning that "the existence of an 'alternate remedy' can be found only if the government has not pursued the [FCA] claims instituted by the relator." *Id.* at 7-8.

Finally, in *United States v. Bisig*, 2005 WL 3532554 (S.D. Ind. Dec. 21, 2005), the United States sought to freeze the defendants' assets, and then subsequently filed an indictment against the defendants, which included a criminal forfeiture allegation. One of the defendants named in the indictment was also named in a *qui tam* suit, which the United States had declined to take over. The relator in the *qui tam* suit argued that the criminal forfeiture proceeding constituted an alternate remedy to her FCA action, and the court agreed. The court noted that the relator was the first to uncover the fraud, the Government had stayed the relator's case pending a resolution of the criminal proceeding, and the Government's forfeiture action would leave the defendant without any assets. The court concluded on these facts that the United States "had made an actual monetary recovery by the relator in the *qui tam* action either impossible or futile" and thus "in effect, elected to pursue its claim through an alternate remedy under § 3730(c)(5)." The court held that the alternate proceeding in that case, however, was just the criminal forfeiture proceeding, and thus the relator's right to participate as a party was limited to that proceeding, and not the entire criminal prosecution. The court agreed that allowing a relator to participate in criminal proceedings generally "would be an undesirable result."

Although the Department disagrees with the court's ruling in *Bisig*, this case shows that the courts may be inclined to find an alternate remedy where a criminal proceeding will recover most or all of a *qui tam* defendants' assets, particularly if the Government also stayed the relator's *qui tam* suit in favor of the criminal case. Under such circumstances, the courts may conclude, as the *Bisig* court did, that the Government deprived the relator of any meaningful opportunity to pursue her *qui tam* suit, and therefore the criminal proceeding was effectively a substitute for that suit. Accordingly, in such

² If a relator seeks to intervene or file a claim in any forfeiture proceeding, government counsel on the FCA action and/or the Director of the Commercial Litigation Branch (Fraud Section), Civil Division, should be consulted immediately.

circumstances (i.e., where the criminal proceeding will render the defendant without assets to satisfy a FCA judgment and particularly where the Government has stayed the *qui tam* case to pursue the criminal case) it may be appropriate to consider a negotiated resolution of the alternate remedy issue, provided that other bases to challenge the relator's entitlement to a share do not exist.³

C. The source of the relator's right to recover

To the extent that a relator is awarded a share of any forfeiture proceeds under the FCA's alternate remedy provision, the relator's entitlement to the proceeds arises strictly out of the FCA and does not constitute a claim of ownership or interest in the specific property forfeited. Consequently, a *qui tam* relator does not qualify as a third party entitled to relief pursuant to 21 U.S.C. § 853(n) or 18 U.S.C. § 983(d). *See Bisig*, 2005 WL 3532554 at *6-7 (granting relator's motions to intervene and for adjudication of relator's interest in forfeited property despite the fact that relator does not qualify for relief under section 853(n) because relator has a valid claim under the FCA). Likewise, the *qui tam* relator is not a victim or third party generally entitled to recovery pursuant to the regulations governing petitions for remission. *See* 28 C.F.R. § 9.4(b) (2011) (providing that only petitioners as defined in section 9.2(o) or attorneys and guardians on their behalf may file a petition for remission); 28 C.F.R. § 9.2(o) (2005) (defining *petitioner* to include an owner, a lienholder, or a victim as defined in other subparts of section 9.2).

D. The relator's share is a percentage of the net forfeiture recovery

If a court orders, or the Commercial Litigation Branch (Fraud Section) decides, that the forfeiture is an alternate proceeding and the relator is entitled to a share of the recovery, then the relator must be awarded a percentage of the net forfeiture recovery.⁴ Determining the exact percentage share to be received by the relator should be determined in the FCA action by agreement of the parties or by adjudication.⁵ While it is preferable for this determination to be made prior to the final disposition of the forfeited assets, this may not always occur. In fact, where the FCA action will be litigated after

³ A threshold requirement for a relator to assert a claim under the alternate remedy provision is that the relator has filed a valid *qui tam* action. *See* Justice Department Briefs filed in *U.S. ex rel. Hefner v. Hackensack Medical Center*, No. 06-2287 (3d Cir.); *U.S. ex rel. Bledsoe v. Community Health Systems, Inc.*, No. 01-6375 (6th Cir.). One reason why the relator's suit may not be valid is that the relator's allegations are based on a "public disclosure" and the relator does not qualify as an original source of those allegations. 31 U.S.C. § 3730(e)(4). There may also be other jurisdictional and non-jurisdictional reasons (for example, where a relator is not the first to file or has failed adequately to plead a FCA claim) why a relator has failed to file a valid action. Moreover, even where a relator's action is proper, the relator may be entitled only to a reduced share. For example, even where a relator qualifies as an original source, if the relator's action is based primarily on certain disclosures as enumerated in the FCA, then the court may award no more than 10 percent of the proceeds. 31 U.S.C. § 3730(d)(1). The relator's share may also be reduced if he or she "planned or initiated the violation," unless he or she is "convicted of criminal conduct" arising from his or her role in the violation, in which case he or she is not entitled to any share. 31 U.S.C. § 3730(d)(3).

⁴ Under the FCA, the percentage of the proceeds that the relator is entitled to recover varies depending on whether the United States intervenes in the relator's action, as well as other factors. 31 U.S.C. § 3730(d)(1) and (2). Assuming that the relator is not otherwise barred from claiming a share of the proceeds, determination of the relator's share will involve two related inquiries: first, the "percentage" of the proceeds of the action to be awarded to the relator, and second, the value of those "proceeds." Section 3730(c)(5) makes these inquiries applicable to a proceeding qualifying as an alternate remedy. The Civil Division has issued guidelines governing the determination of relator share percentages. The Commercial Litigation Branch (Fraud Section) of the Civil Division or government counsel in the FCA action, not forfeiture counsel, is responsible for determining or litigating the relator's share issue.

⁵ Where the issue of the relator's share is addressed may well depend on the forum in which the relator chooses to pursue it; however, the Government should advocate for the determination to be made in the FCA action whenever such litigation remains viable.

the forfeiture proceeding, it is unlikely that the relator's share will be determined prior to the final disposition of the forfeited assets. In such instances, the relator might request that up to 25 percent of the total forfeiture recovery be escrowed in case such funds are later needed to satisfy the relator's share.⁶ Because the proceeds of the forfeiture will be deposited into the Department of Justice Assets Forfeiture Fund (AFF), an escrow is not necessary and should be opposed.⁷

Determining the dollar value of the relator's share is more complicated. In the context of a forfeiture, "the proceeds of the action" would be the amount of money available for deposit into the AFF—i.e., the net recovery, which can be defined as the value of the forfeited property less the value of any valid claims and the costs associated with the seizure, forfeiture, and disposal of the property. Consequently, the dollar value of the relator's share cannot be determined until all claims and expenses are paid and the amount available for deposit into the AFF is fixed.⁸

The dollar value of the relator's share is calculated in the same fashion when the forfeiture action is resolved by settlement. Where possible, the United States should obtain the relator's agreement to the forfeiture settlement. Pursuant to 31 U.S.C. § 3730(c)(2)(B), however, the United States may settle the action with the defendant notwithstanding the objection of the relator "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances."

E. Procedure for paying relator's share

Since the relator's share is mandated by Congress, it is a necessary expense incident to the forfeiture of the property as provided for in 28 U.S.C. § 524(c)(1)(A). Section 524(c)(1), governing the AFF, provides that the AFF "shall be available to the Attorney General...for the following law enforcement purposes—

(A) the payment, at the discretion of the Attorney General,...of *any necessary expense incident to the seizure, detention, forfeiture, or disposal of such property* [forfeited pursuant to any law enforced or administered by the Department of Justice].

28 U.S.C. § 524(c)(1)(A) (2005) (emphasis added). The United States should obtain an order in the FCA action that reflects the percentage share of the net recovery to be paid to the relator. A copy of the order should be forwarded to the USMS directing the USMS to pay the relator's share.

⁶ Relators have made similar requests regarding the escrow of funds paid toward restitution and criminal fines. Where the restitution is payable to governmental victims, the Government may consider such requests, particularly where the FCA action will not be completed. Requests for an escrow of funds due to individual victims or for criminal fines, however, always should be opposed.

⁷ Until the relator's share is determined, the Department will not know the amount of funds that will remain in the AFF. Therefore, final decision on any petition for remission or mitigation should be deferred until the relator's share is determined unless the total value of all petitions for remission or mitigation is less than 75 percent of the net forfeiture recovery. Otherwise, the total liability on the AFF may exceed the net forfeiture recovery.

⁸ Upon request of the relator, the United States may provide the total expenses incurred in connection with a forfeiture action. In the Department's view, relators have no right to challenge forfeiture expenses or intervene in property management issues, and therefore, are not entitled to a detailed itemization of forfeiture expenses, even if the forfeiture action is determined to be an alternate remedy.

Chapter 5:

Use and Disposition of Seized and Forfeited Property

I. Management and Disposal of Seized Assets

A. Role of the U.S. Marshals Service

The U.S. Marshals Service (USMS) has primary authority over the management and disposal of assets in its custody that have been seized for forfeiture or forfeited by law enforcement agencies of the Department of Justice and, by agreement, certain other federal law enforcement agencies.¹ Arrangements for property services or commitments pertaining to the management and disposition of such property are the responsibility of the USMS. The authority of the Attorney General to dispose of forfeited real property and warrant title has been delegated to the USMS Director by 28 C.F.R. § 0.111(i).

B. Department of Treasury property custodians

Management and disposal of assets seized by agencies within the Department of Treasury² and other agencies included by agreement (including certain agencies moved from Treasury to the Department of Homeland Security) are handled by property custodians (generally contractors) operating under Treasury guidelines.³ The Treasury agency case agent or the Asset Forfeiture Coordinator in the agency's field office is generally the initial point of contact for issues relating to seized property custody, management, and disposal.

C. Pre-seizure planning

As soon as possible after assets other than cash are identified for seizure/forfeiture in a federal case, the U.S. Attorney's Office (USAO) or agent in charge of the field office responsible for an administrative forfeiture case should contact the USMS (or Treasury in cases involving Treasury seizing agencies) to discuss pre-seizure planning.⁴

D. Coordination of custody and disposition decisions

Prior to taking any action (e.g., making a commitment in a settlement or plea agreement) concerning the management or disposition of property, the USAO or agent in charge of the field office responsible for an administrative forfeiture case should contact the USMS in cases involving Department of Justice seizing agencies (or Treasury in cases involving Treasury seizing agencies) to discuss any management or disposition issues which may need to be addressed. USMS approval must be obtained prior to the execution of a settlement or plea agreement that requires the payment of a specific amount, rather than an amount determined by the proceeds received from the liquidation of the forfeited property.

¹ The USMS takes custody of firearms and ammunition seized for forfeiture or forfeited, in cases investigated by Department of Justice agencies, other than ATF. ATF has primary authority over the disposition of firearms and ammunition seized and forfeited by ATF.

² For a current list of agencies participating in the Department of Treasury Forfeiture Fund, see 31 U.S.C. § 9703(o).

³ References to the USMS include other departments responsible for managing restrained and seized assets. Please consult the Treasury guidelines for procedures involving assets seized by agencies within the Department of the Treasury. Copies of these guidelines, including "Guidelines for Seized and Forfeited Property," are available at <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Asset-Forfeiture/pages/index.aspx>.

⁴ See Chap. 1, Sec. A-D of this *Manual*.

II. Use of Seized Property

A. Background

Absent an order of forfeiture or declaration of administrative forfeiture affirmatively vesting title to seized property in the United States, the Government does not have title to the property. Thus, any use of property held pending forfeiture raises potential issues of liability and creates the appearance of impropriety. Therefore, the use of such property pending forfeiture is prohibited except in the limited circumstances indicated below. The following general policies govern the use of seized property pending forfeiture.

B. Use of seized property

Property under seizure and held pending forfeiture may not be utilized for any reason by Government or contractor personnel, including for official use, until a final order of forfeiture is issued.

Likewise, Government or contractor personnel may not make such property available for use by others, including persons acting in the capacity of substitute custodians, for any purpose, prior to completion of the forfeiture. However, court authority may be sought for use of seized property, after consultation with the USMS, in situations such as the seizure of a ranch or business where use of equipment under seizure is necessary to maintain the ranch or business.

C. Use of seized property where custody is retained by the state or local seizing agency

To minimize storage and management costs incurred by the Department of Justice (or Treasury in cases involving Treasury seizing agencies), state and local agencies that present motor vehicles or other property items for federal adoptions may be asked to serve as substitute custodians of the property, pending forfeiture, at the discretion of the USMS or Treasury, and upon consultation with the U.S. Attorney in judicial forfeiture cases. In addition, the USMS may enter into a written storage and maintenance agreement with state and local agencies covering such property. Such agreements are contractual in nature and do not require district court approval. Under such an agreement the state or local agency has a responsibility to provide adequate storage, security, and maintenance for all assets in their custody.

Any use of such vehicles or other property, including official use by federal, state, and local law enforcement officials or others, is prohibited by Department of Justice policy until such time as the forfeiture is completed and an equitable transfer is made.

D. Use of real property by occupants

Occupants of real property sought to be forfeited may be permitted to remain on the property, pursuant to an occupancy agreement pending the final order of forfeiture, after consultation between the USMS and the U.S. Attorney.

III. State and Local Real Property Taxes

A. Civil forfeiture cases

Notwithstanding the enactment of 18 U.S.C. § 983(d)(3), which bars assertion of the “innocent owner defense” recovery in certain civil forfeiture cases by persons who are not bona fide purchasers for value, it is the policy of the Department of Justice that the United States should pay state and local real property taxes that accrue up to the date of the entry of an order or judgment of forfeiture. The reasons are two-fold. First, the refusal to pay such taxes would draw the United States into conflict with state and local authorities on matters (the collection of real property taxes) that traditionally have been left to state and local control. Second, the refusal to pay state and local real property taxes would, as a practical matter, complicate the interlocutory or post-judgment sale of real property. It would, for example, be difficult for the USMS to market and sell real property on which ad valorem property taxes had not been paid. Title insurers and escrow officers might be reluctant to provide the necessary warranties in the face of unpaid state and local property taxes, thus undermining the marketability of the property.

B. Criminal forfeiture cases

For the same reasons that it is the Department’s policy in civil forfeiture cases to pay state and local taxes even if those tax liabilities accrue after the events giving rise to forfeiture, it is the Department’s policy to also pay such taxes in criminal forfeiture cases.

C. Payment of interest and penalties on state and local real property taxes

The following policy is meant to ensure consistent national treatment of the payment of interest and penalties on state and local taxes on forfeited real property:

- (1) the United States will pay interest but not penalties on overdue taxes;
- (2) the formula for the rate of interest is set forth in 28 U.S.C. § 1961(a);
- (3) higher rates of interest may be paid where the taxing authority has incurred out-of-pocket interest expenses in excess of the rate specified by section 1961(a) (e.g., where tax certificates have been sold to private investors);
- (4) U.S. Attorneys, with the concurrence of AFMLS, may agree to a higher rate of interest provided that such higher rate is not punitive; and
- (5) taxes and interest thereon may only be paid up to the amount realized from the sale of the property.

IV. Disposition of Forfeited Property and Funds

A. Forfeiture orders

The disposition of property forfeited to the United States is an executive branch decision and not a matter for the court. Consequently, preliminary and final orders of forfeiture should include language directing forfeiture of the property to the United States “for disposition in accordance with law.”

In addition, the orders of forfeiture should specifically address any third party claims against the forfeited property that are recognized by the United States. If the interests of claimants are to be satisfied in whole or in part by payments from the proceeds of a sale of property by the USMS (or Treasury), the proposed forfeiture order should provide specific guidance for the USMS (or Treasury) concerning such payments and, where possible, specify that such claims shall be paid only after the costs of the United States are recovered, and shall be paid only up to the amount realized from the proceeds of the forfeited property.

The comptroller general has determined that judgments in excess of the proceeds of sale are to be paid from the Judgment Fund. However, 28 U.S.C. § 524(c)(1)(D) also provides that the Assets Forfeiture Fund (AFF) is available for the payment of valid liens and mortgages “subject to the discretion of the Attorney General to determine the validity of any such lien or mortgage and the amount of payment to be made...”. The USMS is authorized to pay a lien or mortgage in excess of the proceeds of sale if such payment will facilitate the liquidation of the property and, thus, reduce expenses of such property’s continued custody. Requests for approval of liens and mortgages in excess of the proceeds of sale shall be submitted to AFMLS for approval.

B. Disposition of forfeited property in civil and criminal cases

The Attorney General has been given the authority under 21 U.S.C. §§ 881(e) and 853(h) and other statutes⁵ to dispose of forfeited property “by sale or any other commercially feasible means,” without subsequent court approval. This is generally called a “forfeiture sale” of the property.⁶ It is clear from the language of the forfeiture statutes, from their legislative history, and from the cases and other authorities that have addressed this issue that the Attorney General has complete authority to dispose of forfeited property.

Forfeiture divests an owner of property of all his or her right, title, and interest therein and vests such right, title, and interest in the Government. Accordingly, because of the property’s or its owner’s involvement in criminal activity, forfeiture extinguishes all of the former owner’s interests in that criminally derived or criminally involved asset, and vests title in the United States.⁷ While the relation back doctrine found in section 853(c) provides that all right, title, and interest in forfeitable property vests in the United States upon the commission of the criminal act giving rise to the forfeiture, the Government’s ownership interest therein is not confirmed to the world until a final order of forfeiture is entered by a court.

Since the forfeiture process vests title to the property in the United States, a forfeiture sale is a sale by the Government of property it owns. The forfeiture statutes give the power to the Attorney General, on behalf of the United States as owner, to dispose of the property however he or she deems suitable. After the final order of forfeiture, the court is not involved in the sale or disposal process.

⁵ See 18 U.S.C. §§ 1467(g), 1963(f), and 2253(g).

⁶ The Department of Justice takes the position that 28 U.S.C. § 2001 does not apply to judicial forfeiture sales and no judicial confirmation is required.

⁷ See *U.S. v. Real Property Located at 6124 Mary Lane Drive, San Diego, California*, 2008 U.S. Dist. LEXIS 57172, at *5 (W.D.N.C. July 29, 2008); *United States v. Grundy*, 7 U.S. (3 Cranch) 337, 350-351 (1806); cf. *Republic National Bank of Miami v. United States*, 506 U.S. 80, 89-92 (1992); *United States v. Real Property Located at 185 Hargraves Drive (In Re Newport Saving and Loan Association)*, 928 F.2d 472, 478 (1st Cir. 1991); 21 U.S.C. § 881(h); 21 U.S.C. § 853(c); 18 U.S.C. § 1963(c).

C. Disposition of Forfeited Funds

The USAO securing a forfeiture and the seizing agency are responsible for initiating the disposal of funds forfeited to the United States. In cases involving a Department of Justice seizing agency, the USAO and the seizing agency should provide prompt notification to the USMS of the events, which should lead to a transfer of forfeited funds from the Seized Asset Deposit Fund (SADF) to the Assets Forfeiture Fund (AFF) by entering the forfeiture decision and amount in the Consolidated Assets Tracking System (CATS) and providing the forfeiture documentation to the USMS.⁸ USMS will transfer the funds when assets appear on the CATS Forfeited Assets Pending Disposal report and/or upon receipt of forfeiture documentation .

C.1 Administrative Forfeitures

Seizing agencies are responsible for initiating the transfer of funds from the SADF to the AFF by entering the forfeiture decision and amount into CATS. USMS will transfer the funds based on the entry of the forfeiture in CATS. Receipt of hard copy of forfeiture order by the USMS is not necessary to transfer forfeited cash in administrative cases.

C.2 Civil forfeiture cases concluded by either a consent judgment or default judgment

In the case of either a consent judgment or a default judgment, the forfeited cash should be transferred to the AFF immediately upon the forfeiture date being entered in CATS and/or receipt of forfeiture documentation, unless the U.S. Attorney determines that execution of the judgment should be delayed.

C.3 Civil forfeiture cases concluded by summary judgment or judgment after trial

In the case of a judgment after trial or upon summary judgment, there is an automatic stay of execution of the judgment of 14 days. See Fed. R. Civ. P. 62(a) (prior to the December 1, 2009 amendment, the period of the automatic stay was ten days).⁹ The USAO should delay the forfeiture decision in CATS until the period for the stay has passed. If this period expires and the USAO determines that no motion or requests for additional stays have been filed, the USAO should enter the forfeiture decision in CATS the next working day following the expiration of this period. The USMS will then proceed with transferring the forfeited cash.¹⁰

C.4 An additional stay (civil or criminal judicial forfeitures)

If the district court or court of appeals grants an additional stay, the funds will remain in the SADF until the termination of the stay. The USAO should delay the forfeiture decision in CATS until the stay period terminates or a decision is made to discontinue the forfeiture proceedings.

⁸ For cases involving assets seized by a Treasury agency, the USAO should provide prompt notification to the Treasury custodian for transfer to the Department of Treasury Forfeiture Fund.

⁹ See Fed. R. Civ. P. 6(a)(1) (providing guidance in computing the length of the stay).

¹⁰ Even absent the filing of a motion for a stay of the judgment pending appeal pursuant to Fed. R. Civ. P. 62(d) and the transfer of forfeited funds from the Seized Asset Deposit Fund to the AFF, the courts of appeals will be deemed to retain in rem jurisdiction to hear any direct appeal. See *Republic National Bank of Miami v. United States*, 506 U.S. 80, 93 (1993) (holding that the transfer of res from the district to the AFF does not divest the court of in rem jurisdiction over the case).

C.5 Criminal forfeiture cases

In criminal forfeiture cases, the USMS will not transfer criminal proceeds to the AFF until a final order of forfeiture has been entered by the court and the USAO has made the appropriate entries into CATS authorizing the transfer.

V. Attorney General's Authority to Warrant Title

A. Background

Section 2002 of the Crime Control Act of 1990, which amends 28 U.S.C. § 524(c), gives the Attorney General the authority to warrant clear title upon transfer of forfeited property. Section 524(c)(9)(A) reads as follows:

Following the completion of procedures for the forfeiture of property pursuant to any law enforced or administered by the Department, the Attorney General is authorized, in her discretion, to warrant clear title to any subsequent purchaser or transferee of such property.

The authority to execute deeds and transfer title has been delegated to chief deputies or deputy U.S. Marshals by 28 C.F.R. § 0.156. The section 0.156 delegation predates the Asset Forfeiture Program and applies to all court-ordered sales of property, not just forfeited property.

The preferred means to transfer forfeited real property is by special warranty deed executed by the U.S. Marshal. The special warranty deed assures the grantee/buyer that the United States, as the current seller, has done nothing to encumber the property, nor has it conveyed any right, title, or interest in the property while the Government was the owner of the property. In effect, the special warranty deed, discussed in section IV.B, warrants the forfeiture process.

Under appropriate circumstances, a quitclaim deed may be used to transfer property. The quitclaim deed makes no warranty representations. It serves only to convey whatever right, title, and interest the Government had as of the execution date. Although property may be transferred by a general warranty deed,¹¹ it is Department of Justice policy to use general warranty deeds only in exceptional circumstances as outlined in section IV.C.¹²

B. Use of a special warranty deed and indemnification agreement

It is suggested that the language of the special warranty deed be as follows, with the insertion of the specifically applicable circumstances as required:

The grantor covenants to specially warrant the title to the property hereby conveyed against any claim arising from...[insert the specifically applicable circumstances here].

Further, when such special circumstances exist, the buyer may also request that the United States provide certain indemnifications in order to obtain title insurance. These indemnification agreements establish affirmative measures to be taken by the United States, beyond the basic terms and

¹¹ A general warranty deed assures the grantee/buyer that title to the property is free and clear of any and all liens and encumbrances and insures the grantee/buyer from any future claims against the property.

¹² As used in this policy, the terms *general warranty deed* and *special warranty deed* are not intended to be limiting in their application. In some states, warranty deeds are not used (e.g., in California a “grant deed” provides limited statutory warranties). The use of such state variations equivalent to a general warranty deed is satisfactory for purposes of this policy.

obligations of its warranty deed, in the event that claims are later made against the property. The indemnification agreement may be included either in the terms of the special warranty deed or in a separate document that incorporates the deed by reference. In either form, indemnification agreements will be limited to the following terms:

- (1) The United States will specially warrant its title against defects or clouds arising out of the forfeiture process and hold the buyer harmless as a result of such defects in title or clouds involving the propriety of the forfeiture of the property.
- (2) In the event that a court in a final judgment rules that the United States did not acquire valid legal title to the real property through the forfeiture process and therefore was not able to convey clear title to the buyer, the United States will refund to the buyer the amount of the purchase price of the property, plus the value of any improvements made to the property by the buyer. The amount will be paid out of the AFF, plus interest on the total amount at the current rate as provided in 28 U.S.C. § 1961 from the date of the purchase of the property by the buyer to the date of the final judgment.
- (3) The United States, by its special warranty deed, does not warrant the title of the prior owner of the property who acquired title before the forfeiture.

C. Use of a general warranty deed

If the buyer of the forfeited property is still unable to procure a title insurance policy, the U.S. Marshal may be authorized to execute a general warranty deed. Any determination to transfer property by a general warranty deed must be approved by the USMS Asset Forfeiture Division.

It is Department policy that the Attorney General's discretion to warrant clear title, through the use of a general warranty deed, be exercised only in compelling circumstances where the financial advantage of offering a general warranty deed in the particular case, compared to the available alternatives, far outweighs both the potential cost of honoring the warranty in that case and the potential effect of increased purchaser demand for general warranty deeds in future sales of other forfeited properties. The USMS Asset Forfeiture Division, in the exercise of sound business judgment, shall also consider the cumulative potential liability that will accrue over time as a result of each successive use of a general warranty deed.

VI. Purchase or Personal Use of Forfeited Property by Department of Justice Employees

Under 5 C.F.R. § 3801.104, Department of Justice employees are prohibited from purchasing, either directly or indirectly, or using any property if the property has been forfeited to the Government and offered for sale by the Department of Justice or its agents. In addition, Department of Justice employees are prohibited from using such property that has been purchased, directly or indirectly, by a spouse or minor child.

This policy is intended to ensure that there is no actual or apparent use of inside information by employees wishing to purchase such property. The purpose of this policy is to protect the integrity of the Asset Forfeiture Program and avoid problems before they develop. It is important to the integrity of the Asset Forfeiture Program that we preclude even the appearance of a conflict of interest that would otherwise arise should a Department employee purchase forfeited property.

A written waiver to the aforementioned restrictions may be granted by the agency designee upon a determination that, in the mind of a reasonable person with knowledge of the circumstances, purchase or use by the employee of the asset will not raise a question as to whether the employee has used his or her official position or nonpublic information to obtain or assist in an advantageous purchase or create an appearance of the loss of impartiality in the performance of the employee's duties. A copy of this waiver must be filed with the Deputy Attorney General.

Chapter 6: Equitable Sharing and Official Use

Federal law authorizes the Attorney General to share federally forfeited property with participating state and local law enforcement agencies.¹ Through equitable sharing, any state or local law enforcement agency that directly participates in a law enforcement effort that results in a federal forfeiture may either request to put tangible forfeited property into official use or an equitable share of the net proceeds of the forfeiture. The exercise of this authority is *discretionary*. The Attorney General is not required to share property in any case. Where the Attorney General chooses to share forfeited property, federal law, as set forth in the Controlled Substances Act, at 21 U.S.C. §881(e)(3), for example, provides that:

The Attorney General shall assure that any property transferred to a state or local law enforcement agency...

- (A) has a value that bears a reasonable relationship to the degree of direct participation of the state or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and
- (B) will serve to encourage further cooperation between the recipient state or local agency and Federal law enforcement agencies.

Equitable sharing and official use requests will be granted only if forfeited property or net proceeds² from the sale of forfeited property remain after all approved claims, petitions for remission, and restoration requests have been processed and paid. In addition, international sharing must be reviewed and approved prior to payment of domestic sharing.³

I. Processing Applications for Equitable Sharing

A. Eligible participants

In order for a state or local law enforcement agency to request equitable sharing, the agency must be an eligible participant in the Equitable Sharing Program (Program). The Asset Forfeiture and Money Laundering Section (AFMLS) determines the eligibility of a state or local law enforcement agency to participate in the Program.

If an agency does not appear in the Consolidated Asset Tracking System (CATS), AFMLS must be contacted in order to verify the agency's current status and/or any of its prior requests for participation in the Program. AFMLS will determine the eligibility of any law enforcement agency not currently admitted to the Program. AFMLS will assess the request according to criteria outlined in the *Guide to Equitable Sharing for State and Local Law Enforcement Agencies* (April 2009) (*Guide*). No National

¹ See 21 U.S.C. § 881(e)(1)(A) and (e)(3); 18 U.S.C. § 981(e)(2); and 19 U.S.C. § 1616a. For further details on equitable sharing, please refer to the *Guide* and the *Attorney General's Guidelines on Seized and Forfeited Property* (revised Nov. 2005)(*Guidelines*).

² In any case with underwater asset(s) (i.e., where the asset expenses are greater than income), the deciding official must offset the negative value of the underwater asset(s) against any asset(s) with a net income prior to distribution of any approved sharing.

³ See Chap. 9, Sec. XIII of this *Manual*.

Crime Information Center (NCIC) code will be issued and no agency will be accepted into the Program until AFMLS' determination is complete.

B. Equitable sharing allocations

Equitable shares allocated to a law enforcement agency must bear a reasonable relationship to the agency's direct participation in the law enforcement effort resulting in the forfeiture. As a general rule, the recommended equitable sharing allocation should be based on a comparison of the workhours and qualitative contributions of each and every federal, state, and local law enforcement agency that participated in the law enforcement effort resulting in the forfeiture.⁴ The workhours of every agency participating in the law enforcement effort, including the lead federal agency, must be reported on the Application for Transfer of Federally Forfeited Property (DAG-71), Federal Contribution Form (FCF), or a supplemental memorandum for the decision maker to review. Equitable sharing percentages may also be awarded based on an agency's participation in a task force that has previously adopted a task force sharing arrangement consistent with Department of Justice (DOJ) policy.⁵

Funds collected to satisfy a forfeiture money judgment are not eligible for equitable sharing where no collection efforts were expended by the participants in the underlying investigation. For example, if a Deputy U.S. Marshal, USAO employee, or other federal agency locates funds in satisfaction of a money judgment, those funds cannot be shared unless the state or local agency assisted in the collection effort. Funds located and applied to the money judgment at the time the money judgment is entered could be eligible for sharing.

C. Agency field office

A state or local law enforcement agency participating in the Program may request official use or an equitable share of forfeited property by submitting a Form DAG-71 to the appropriate field office of the federal investigative agency with primary responsibility for the law enforcement effort leading to the seizure and subsequent forfeiture. The requesting agency must complete the DAG-71 to include the workhours expended by agency personnel and a detailed narrative of the agency's specific role in the effort in section VI. The field office may reject an incomplete or insufficient DAG-71. Once submitted, a properly executed DAG-71 may not be changed or altered in any manner. The requesting agency may, however, submit an amended DAG-71, reflecting changes to the information reported in its original submission. The field office must enter the information reported on the DAG-71 in CATS.

Federal law enforcement agencies that participated in the effort must submit a FCF to the lead/processing federal agency to record participation or, where applicable, request a Fund-to-Fund transfer (e.g., a transfer from the Justice Assets Forfeiture Fund (AFF) to the Treasury Forfeiture Fund (TFF) or vice versa) for the assistance they provided.⁶ Once submitted, a properly executed FCF cannot be changed or altered in any manner. The requesting agency may, however, submit an amended FCF, reflecting changes to the information reported on the original submission.

⁴ Qualitative factors that the decision maker may consider when determining a sharing percentage are outlined in sec. VII.B of the *Guide to Equitable Sharing*.

⁵ A formal Memorandum of Understanding (MOU) reflecting the task force sharing arrangement must be signed by all agencies participating in the task force before any sharing decisions may be made pursuant to the agreement. Such MOUs should be updated periodically to reflect material changes in the agencies constituting the task force or in any agency's contribution to forfeitures credited to the task force.

⁶ See Sec. VI of this chapter for additional information on the FCF.

Following receipt of the DAG-71 or FCF, the field office must complete section I of the Decision Form for Transfer of Federally Forfeited Property (Form DAG-72) and enter the information in CATS. The field office must forward to investigative agency headquarters all documents supporting the equitable sharing request and recommendation, including but not limited to, the DAG-71, FCF, DAG-72, and supplemental memorandum.

D. Final decision maker

D.1 Investigative agency

If assets are administratively forfeited and the total appraised value of all items forfeited under a single Declaration of Administrative Forfeiture is less than \$1 million, the head of the investigative agency, or designated agency headquarters official, decides the appropriate equitable share as to each item and requesting agency. The investigative agency must then complete section II of the DAG-72, and enter the decision in CATS.

D.2 United States Attorney

If the assets are judicially forfeited and the total appraised value of all of the assets forfeited in a single judicial forfeiture order is less than \$1 million, the U.S. Attorney decides the appropriate equitable share as to each asset and requesting agency. The investigative agency headquarters must submit its recommendation by completing section II of the DAG-72, entering its recommendation in CATS, and forwarding all documents supporting the equitable sharing request, including, but not limited to, the DAG-71, FCF, DAG-72, and supplemental memorandum to the USAO. The U.S. Attorney, or the U.S. Attorney's designee,⁷ must decide the appropriate equitable share as to each asset and agency, complete section III of the DAG-72, and enter the decision in CATS.

D.3 Deputy Attorney General

Regardless of whether assets are administratively or judicially forfeited, the Deputy Attorney General (DAG), or the DAG's designee, decides the final equitable share as to each asset and requesting agency in: (1) all cases in which the total appraised value of all of the assets forfeited under a single Declaration of Administrative Forfeiture or judicial forfeiture order is \$1 million or more; (2) multi-district cases; or (3) cases involving the equitable transfer of real property.⁸ The appropriate decision-maker with delegated decision making authority from the DAG is generally determined by the value of the assets to be shared, as set forth below. Assets forfeited under a single declaration of administrative forfeiture or judicial forfeiture order cannot be separated so that only the individual assets having a value greater than \$1 million are submitted to AFMLS, the AAG, or the DAG for sharing decisions.

⁷ Any delegation by a U.S. Attorney of authority to decide equitable sharing requests must be in writing and kept on file together with other delegations of authority by the U.S. Attorney.

⁸ The transfer of real property to a state or local law enforcement agency for official use is contingent upon the agency's demonstration of a compelling law enforcement need for the property. The recipient agency must sign an MOU regarding to the use that the property is to be put and agree to pay any federal costs or expenses, as well as the "federal share of the property's value, before the transfer will be approved. *See Guide*, section VIII.C.1. All sharing requests involving the transfer of real property must be submitted to AFMLS for processing, regardless of the value of the real property.

D.3.a Assets valued between \$1 million and \$5 million

The DAG has delegated to the Chief of AFMLS the authority to decide equitable sharing requests for judicially or administratively forfeited assets in which (1) the property to be shared is valued between \$1 million and \$5 million and (2) AFMLS, the seizing agency, and the USAO agree on the sharing allocations. If the seizing agency, the USAO, and AFMLS do not agree on the sharing allocations, the final decision must be made by the DAG.

D.3.b Assets valued over \$5 million

The Assistant Attorney General for the Criminal Division (AAG) has been delegated authority from the DAG to decide equitable sharing requests for judicially or administratively forfeited assets in which (1) the property is valued in excess of \$5 million, and (2) the seizing agency, the USAO and AFMLS agree on the sharing allocations. If the seizing agency, the USAO and AFMLS do not agree on the sharing allocations, the final decision must be made by the DAG.

In all of these cases, the lead federal investigative agency for the law enforcement investigation completes section II of the DAG-72 as to each asset and the agency, must enter its recommendation in CATS, and forward all documents supporting the equitable sharing request to the USAO. The USAO then completes section III of the DAG-72 for each asset, enters its recommendation in CATS, and forwards all documents supporting the equitable sharing request to AFMLS.

Regardless of whether the final decision maker is the Chief of AFMLS, the AAG, or the DAG, AFMLS will enter the final equitable sharing decision into CATS.

E. Communication with the requesting agency

Federal personnel and contractors involved in making, processing, or deciding an equitable sharing request must not represent whether sharing will occur at all, what specific percentages or dollar-amounts will be awarded, or that a sharing request has been or will be approved until the final decision maker has rendered a decision. Premature projections regarding approval of a sharing request often prove unfounded, needlessly risk friction with or disappointment by a supporting law enforcement agency if the projected sharing is ultimately disapproved or substantially reduced, and demonstrate disregard and disrespect for the discretionary authority of the decision maker.

That said, federal officials should promptly advise sharing applicants whenever their requested shares are denied or reduced. DOJ seizing agencies should also inform other federal agencies that participated in the investigation of any reduction or denial of their requested shares. Prompt and accurate communication about sharing matters is of paramount importance and should occur in the first instance at the field level.

F. Reimbursement of federal costs and expenses

State and local law enforcement agencies that receive real property or tangible personal property must reimburse the AFF for any liens, accrued expenses, costs of sharing with other agencies, and

the “federal share.”⁹ Payment must be made within 60 calendar days of notification of the total expenses. If the requesting agency is unable to pay these expenses, these costs may be offset against the requesting agency’s other pending equitable sharing awards, if any. If the requesting agency has no pending sharing requests or is unable or unwilling to pay the balance within 60 calendar days, the property must be sold and up to 80 percent of the proceeds equitably distributed to the agency in lieu of transfer. The federal deciding authority shall modify the decision from item to cash/proceeds without the need for the requesting agency to submit an amended DAG-71 Form.

Payment of neither the costs and expenses nor the federal share may be waived except in cases of extreme hardship where the requesting agency lacks sufficient funds from previous equitable sharings or other available funds to pay the total costs and expenses. The requesting agency must demonstrate in writing that it is unable to pay the total reimbursement, that the payment of such reimbursement would result in an immediate and extreme financial hardship to the requesting agency, and that the benefit of receiving the property outweighs the receipt of the agency’s otherwise applicable equitable share.

The decision to waive the federal share rests with the final decision maker for the overall sharing request. The decision to waive accrued expenses rests with the federal agency that incurred the expenses. The decision maker or federal agency considering waiving expenses must first contact the member of the AFMLS Agreement Certification and Audit team member who is assigned responsibility for the agency to ascertain the ability of the state or local law enforcement agency to pay the amount due prior to approving any waiver. In addition, if it is fiscally advantageous to transfer the property, as opposed to liquidating the property and transferring the proceeds, the decision maker may take those facts into consideration when determining whether to waive expenses.

II. Equitable Sharing Payments

The USMS makes equitable sharing payments only after final approval of the sharing appears on the CATS Equitable Sharing Payments Authorization Report. This will not happen unless all information required to authorize the payment has been entered in CATS by the investigative agency, the USAO, and/or AFMLS and the recipient agency is in compliance with all reporting requirements.

All equitable sharing payments to state and local law enforcement agencies are electronically transferred by the USMS through its E-Share Program.¹⁰ In order to electronically receive equitable sharing payments, a state or local law enforcement agency must submit a completed “UFMS Vendor Request Form” (ACH form) to the USMS E-Share helpdesk at E.Share.Help@usdoj.gov. Recipient agencies receive auto-generated emails from the E-Share Program when funds have been disbursed to their agency.¹¹

All equitable sharing payments are subject to offset under the Debt Collection Improvement Act of 1996 (DCIA). The DCIA requires the Department of the Treasury (Treasury) and other disbursing officials to offset federal payments in order to collect delinquent non-tax debts owed to the United States and certain delinquent debts owing to a state government. In addition, the Taxpayer Relief

⁹ The federal share is the amount retained in the AFF which represents the percentage corresponding to the federal agency’s participation in the law enforcement effort. If a state or local agency opts to take an asset for official use as opposed to receiving the net proceeds, the agency must pay the value of the federal share that would have been retained had the asset been sold. In these instances, the federal share is based on the most recent appraised value of the asset. In no case shall the federal share be less than 20 percent of the appraised value of the asset.

¹⁰ Approved sharings less than \$50.00 will not be processed.

¹¹ Refer to the Department of the Treasury, Treasury Executive Office of Asset Forfeiture or to the U.S. Postal Inspection Service for information regarding payments from these agencies.

Act of 1997 includes a provision that provides for the continuous levy of federal non-tax payments to collect delinquent tax debts. The Treasury Offset Program (TOP), which is designed to offset payments related to the DCIA, requires the collection of the Taxpayer Identification Number (TIN) and banking account information for the payee on any payment.

If a delinquent debt is attributable to the TIN number provided by a requesting agency on the ACH form submitted with its sharing request, the funds the USMS would otherwise transfer to the agency will be offset—even if the delinquent debt giving rise to the offset is attributable to another governmental agency in the same governmental jurisdiction as the requesting agency. When sharing funds due to be paid to state and local law enforcement agencies are offset, the affected agency should contact the USMS E-Share helpdesk to identify the TIN that appears on its ACH form. The affected agency should then contact the TOP Help Line at 800-304-3107 to determine the amount of, and identity of the governmental agency responsible for, the delinquent debt so the requesting agency can seek repayment of the offset funds from the city, county, or state agency for which the offset was intended.

III. Compliance

In order to participate in the Program, state and local law enforcement agencies must first submit, and annually resubmit, an Equitable Sharing Agreement and Certification form¹² signed by both the head of the law enforcement agency and the head of the governing body having budgetary authority over the law enforcement agency. By signing the Equitable Sharing Agreement, the signatories agree to be bound by, and comply with, the federal statutes and DOJ policies governing the Program.

Any breach of the Sharing Agreement by a state or local law enforcement agency may render it non-compliant or ineligible to receive equitable sharing payments. Failure to annually resubmit a properly completed Equitable Sharing Agreement and Certification form may also result in the permanent extinguishment of the agency's pending equitable sharing distributions. While federal investigative agencies and U.S. Attorneys have no obligation affirmatively to monitor an agency's eligibility, they are obliged promptly to report to AFMLS any information that might affect an agency's eligibility to participate in the Program. Participation may be barred on either a temporary or permanent basis where a requesting agency has failed timely to submit an Equitable Sharing Agreement and Certification form or ACH form or to meet any other requirements as set forth in the *Guide*. Participation may also be temporarily or permanently barred: (1) pending resolution of any audit or investigation of an agency's possible mishandling or misuse of shared funds and or property placed into official use; or (2) if applicable state laws or local ordinances prevent compliance with federal statutes and equitable sharing policies.

There are three agency compliance statuses that appear in CATS:

- (1) **Compliant:** An agency will be deemed compliant once all required paperwork is received by AFMLS and any discrepancies have been resolved. Compliant agencies will receive equitable sharing payments.

¹² See <http://www.justice.gov/criminal/afmls/equitable-sharing> to download a copy of the Equitable Sharing Agreement and Certification form.

- (2) **Non-Compliant:** AFMLS has the discretionary authority to designate an agency non-compliant for any of several reasons, including adverse audit findings, impermissible expenditures, or failure to submit the Equitable Sharing Agreement and Certification form within sixty (60) days from the end of an agency's fiscal year. The agency remains non-compliant until all required paperwork is received by AFMLS and/or all discrepancies and audits findings are resolved. Pending sharing distributions will be held in suspense until AFMLS designates the agency compliant. Federal agencies may continue accepting and processing any DAG-71(s) received from a non-compliant agency but no sharing payment will be made so long as the agency is designated non-compliant. However, if an agency remains non-compliant for over one year, AFMLS may extinguish all pending sharing. Funds previously approved for transfer will remain in the AFF.
- (3) **Ineligible:** AFMLS has the discretionary authority to designate an agency ineligible for equitable sharing where the agency has violated the Program's rules and regulations.¹³ Any pending sharing disbursements will be suspended until AFMLS makes a final determination regarding the agency's continued participation in the Program. Federal agencies may NOT accept or process any DAG-71 received from an ineligible agency. No seizures that occur while an agency is designated ineligible can form the basis for equitable sharing, even if the agency is rendered compliant at a later date.

IV. Equitable Sharing Ceremonies

Equitable sharing ceremonies foster goodwill and present a unique opportunity to highlight for the local community the cooperative efforts of federal, state, and local law enforcement agencies. All of the state and local law enforcement agencies involved in the law enforcement effort leading to the underlying forfeiture should be invited to participate in the ceremony. Officials from the USAO, the federal seizing agency, AFMLS, and the USMS should be included as appropriate.

On occasion and schedule permitting, the Attorney General has personally presented significant equitable sharing checks. U.S. Attorneys and federal seizing agencies must contact AFMLS as far in advance as possible of upcoming opportunities for significant sharing ceremonies to coordinate all scheduling and pertinent details.

While sharing payments are no longer made by paper checks, a sharing check template may be obtained from the USMS E-Share Helpdesk. This template may be used to create an enlarged image of a sharing check suitable for the presentation ceremony.

V. Federal Contribution Form

When federal agencies work together in a joint investigation, each agency should complete the FCF to record participation and, when appropriate, request a transfer of funds from one forfeiture fund (e.g., AFF, TFF, USPS forfeiture funds) to the fund of the recipient agency. Any forfeited funds or proceeds from the sale or other disposition of forfeited property may only be transferred directly to the appropriate forfeiture fund of the requesting agency, not to the requesting agency itself.

When federal agencies from the same forfeiture program participate in a joint investigation, no Fund-to-Fund monetary transfers occur. In these cases, the FCF serves the important function of

¹³ An agency may also be designated ineligible if it remains out of compliance for over one year, or its NCIC code has changed, it has disbanded or is no longer a participant in the Program or it no longer qualifies as a law enforcement agency.

documenting the participation of each federal agency and also provides necessary information to the sharing decision-maker who must evaluate the overall work hour and qualitative contributions of all participating federal, state, and local agencies when determining sharing percentages for “cash/proceeds” decisions. However, submission of an FCF in these instances is not required and agency participation can be tracked through other information in CATS.

When an AFF investigative agency participates in an investigation resulting in the seizure of property processed for forfeiture by another federal investigative agency, it can record the seizure in CATS by creating a “referral asset.” A referral asset is another method for capturing statistics on seizures to document participation in an investigation

An FCF may only be completed by the following federal agencies:

NCIC/ORI CODE	Agency Name
CBPAMO000	Customs and Border Protection- Air Operations
CBPOBP000	Customs and Border Protection- Border Patrol
CBPOFO000	Customs and Border Protection- Field Operations
DCATF0000	Alcohol, Tobacco, Firearms and Explosives
DCDOS0000	Department of State
DCICE0000	Immigration and Customs Enforcement
DCIS	Defense Criminal Investigative Service
DEA	Drug Enforcement Administration
FBI	Federal Bureau of Investigation
IRS	Internal Revenue Service
MDFDA03T0	Food and Drug Administration
TTB	Tax and Trade Bureau
USCG	U.S. Coast Guard
USDAIG	U.S. Department of Agriculture, Office of Inspector General
USMS	U.S. Marshals Service
USPS00000	U.S. Postal Service
USSS	U.S. Secret Service

When a TFF agency becomes involved in an ongoing joint investigation involving an AFF agency and state or local law enforcement agencies and there is an existing MOU on sharing between the AFF agency and the participating state and local law enforcement agencies, the sharing percentages agreed upon in the MOU must be reduced to include a transfer to the TFF in recognition of the Treasury agency’s participation. When a federal agency is invited to join an ongoing investigation, the agency must immediately notify the lead agency and the USAO of its involvement. Any issues that cannot be resolved through communication between case agents be submitted to the appropriate special agent-in-charge (SAC) for the involved agencies. Agency headquarters will not become involved in the resolution of issues unless the SAC from either of the participating agencies requests assistance. Prompt and accurate communication about sharing matters is important, and should occur, in the first instance, at the field level.

VI. Federal Official Use

Section IV.D of the *Attorney General's Guidelines on Seized and Forfeited Property* (revised Nov. 2005) (*Guidelines*) outlines the priority scheme and approval requirements for federal retention of forfeited property. The decision maker for official use requests varies depending on the agency that submitted the request and the value of the asset.

In any instance where the property requested for federal official use is valued at over \$50,000, the seizing agency and/or U.S. Marshals Service (USMS) must provide AFMLS with advance notice and an opportunity to review the request.

Section IV.E of the *Guidelines* requires that each agency maintain internal guidelines governing official use requests. In addition, the *Guidelines* address how an agency must review competing official use requests and the payment of any liens on the property sought for official use.

Where one DOJ agency requests an asset for official use that was seized by another DOJ agency, the requesting agency must follow the official use request process of the seizing agency and USMS (i.e., USDA wants to place a vehicle into official use that was seized by FBI). The FCF is not the appropriate form to request official use in this situation. The official use decision maker, as identified in the *Guidelines*, must enter the decision in the CATS official use screen. The disposal instructions/disposal should state “retain for official use/official use.”

If a TFF participant wants to place an asset seized by a DOJ agency into official use, it must file an FCF with the lead seizing agency. (i.e., IRS wants to place a vehicle into official use that was seized by DEA). The seizing agency must enter the FCF in the CATS sharing request and enter a decision in the DAG-72 screen. The disposal instructions/disposal should reflect “transfer for equitable sharing.” Similarly, if a DOJ agency wants to place an asset seized by a non-DOJ agency into official use, the DOJ agency must submit a completed FCF to the seizing agency.

Agencies that are not members of either the DOJ or Treasury forfeiture programs must request items for official use through the agencies and USMS. No FCF form is required and the decision to transfer is made via the official use approval process, not the equitable sharing approval process.

VII. Reverse Sharing

DOJ investigative agencies participating in an investigation resulting in the seizure of property that is processed for forfeiture by a state or local law enforcement agency or foreign jurisdiction should create a “referral asset” in CATS in order to document their participation in the investigation. If any proceeds are received from the state or law enforcement agency or foreign jurisdiction, through “reverse sharing,” the agency’s share will be deposited into the AFF.

VIII. International Sharing of Forfeited Assets

DOJ encourages international asset sharing with countries that facilitate the forfeiture of assets under U.S. law. International sharing, which requires both DOJ and Department of State approval, and concurrence by Treasury, must be either approved or pre-approved before any domestic equitable sharing can take place. The percentage granted to a foreign country is often guided by international sharing agreements or is determined based on factors which differ significantly from the “workhour and qualitative contribution” standard used in determining domestic sharing.

DOJ policy applicable to international sharing, as well as the forfeiture of assets located overseas, appears in Chapter 9 of this *Manual*.

IX. Real Property Transfers

Pursuant to 18 U.S.C. § 981(e)(1) and (2) and 21 U.S.C. § 881(e)(1)(A), the Attorney General has the authority to transfer forfeited property to any federal agency or state or local law enforcement agency that participated in the seizure or forfeiture of the property. The Attorney General also may transfer forfeited property to a state or local designee, or individual state, provided that the recipient meets certain statutory requirements. *See* Pub. L. 108-199, Div. B, Title I, § 108, 118 Stat. 61 (Jan. 23, 2004) (reprinted in the “Historical and Statutory Notes” for 28 U.S.C. § 524); 21 U.S.C. § 881(e)(4) (B). Limitations and conditions regarding permissible uses of transferred property are set forth in the *Guidelines*. Listed below are several common types of real property transfers.

A. Weed and Seed

The Weed and Seed Initiative authorizes the transfer of federally forfeited real property, through state or local law enforcement agencies, to non-profit organizations. The recipient non-profit organization must agree to use the property to support the goals of the Initiative. The purpose of the Initiative is to rehabilitate and rejuvenate neighborhoods and provide specified community-based services. *See* 21 U.S.C. § 881(e)(1)(A); *Guide*, section VIII.C.2.

The proposed use of the forfeited property must support community-based drug treatment, crime prevention, and education; improve housing; enhance job skills; or perform other activities that will substantially further the Initiative’s strategy. A request for a Weed and Seed transfer is initiated by the U.S. Attorney for a district in the state in which the property is located. In order for the real property to be eligible for treatment as a Weed and Seed property, it must have an appraised value of \$50,000 or less, or have an appraised value of \$200,000 or less if the net equity value of the property is \$50,000 or less.

B. Operation Goodwill

Pursuant to Pub. L. 108-199, Div. B, Title I, § 108, 118 Stat. 61 (Jan. 23, 2004) (reprinted in the “Historical and Statutory Notes” for 28 U.S.C. § 524), the Attorney General may transfer real property of limited or marginal value to a state or local government agency, or its designated contractor or transferee, for use in support of community-based revitalization programs. Such programs include drug abuse treatment, drug and crime prevention, education, housing, job skills training, and other community-based health and safety programs.

The USMS reviews all forfeited property in its inventory to identify properties eligible for Operation Goodwill. To be eligible, the property must have an appraised value of \$50,000 or less, or have an appraised value of \$200,000 or less if the net equity value of the property is \$50,000 or less.

C. Governor’s request for historic and recreational purposes

Pursuant to 21 U.S.C. § 881(e)(4)(B), the governor of a state in which forfeited property is located may request that the Attorney General transfer the property to the state. To be eligible for the transfer, the state must use the forfeited property as a public area reserved for recreational or historic purposes, or for the preservation of the property’s natural condition.

D. Real property transfer to a federal agency

Pursuant to 21 U.S.C. § 881(e)(1)(A), the Attorney General may transfer forfeited property to a federal agency. A DOJ agency may request the authority to place the real property into official use; however, the proposed usage of such property must be consistent with a law enforcement purpose. Transfers of real property to other federal components may also be considered; however, such transfers must serve a significant and continuing federal purpose. *Guidelines*, section IV.B.

Chapter 7: Attorneys' Fees

I. Payment of Attorneys' Fees in Civil Forfeiture Cases

A. Summary

The Civil Asset Forfeiture Reform Act (CAFRA) of 2000 amended 28 U.S.C. § 2465(b) to provide for an award of attorneys' fees and other litigation costs to any claimant in a civil forfeiture case who "substantially prevails." Such awards will be paid out of the Judgment Fund.¹

B. Discussion

Prior to the enactment of CAFRA, there was no provision for liability for attorneys' fees and costs that applied specifically to civil forfeitures. Attorneys' fees were awarded to prevailing non-government parties pursuant to the Equal Access to Justice Act (EAJA). In EAJA, Congress provided that the non-government party could seek reimbursement of costs and legal fees if the Government's position was not substantially justified.²

In CAFRA, Congress amended section 2465 to provide for the mandatory award of attorneys' fees and other litigation costs to non-government parties who substantially prevail in a civil forfeiture proceeding, regardless of whether the Government was justified in bringing the forfeiture action. To be eligible for attorneys' fees, however, the claimant must pursue the claim in court and obtain a judgment that the United States is liable for attorneys' fees under section 2465.³

When EAJA was enacted, the primary source of funds to pay judgments against the United States was the permanent judgment appropriation. *See* 31 U.S.C. § 1304. The Judgment Fund is available, by law, to pay final adverse judgments (and certain compromise settlements) when "payment is not otherwise provided for."⁴ In the past, however, citing the need to establish an aggressive use of forfeiture and considering an EAJA award as a predictable expense incident thereto, the Department of Justice used its legal authority, pursuant to 28 U.S.C. § 524(c)(1)(A), to permit the use of Assets Forfeiture Fund (AFF) monies to pay EAJA awards arising from actions related to the forfeiture, attempted forfeiture, or seizure of property for forfeiture. The Department of Justice developed a policy and three-tier test to review requests for payment of EAJA awards from the Assets Forfeiture Fund (AFF) and these requests were submitted to AFMLS for review and approval.

The enactment of CAFRA specifically provided for liability for attorneys' fees and costs for a prevailing claimant in a civil proceeding. Because the provisions of section 2465 are specific to "any

¹ Forms for requesting payments out of the Judgment Fund are available on <http://www.fms.treas.gov/judgefund/forms.html> and should be submitted directly to the office that handles Judgment Fund matters.

² "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A).

³ In civil forfeitures of firearms and ammunition pursuant to 18 U.S.C. § 924(d) where a claimant substantially prevails, CAFRA's attorneys' fees provision applies and the United States is liable for reasonable attorneys' fees and other litigation costs. 28 U.S.C. § 2465(b) (2000).

⁴ 31 U.S.C. § 1304(a)(1).

civil proceeding to forfeit property under any provision of civil law,” they appear to have displaced EAJA as a means for payment of attorneys’ fees and costs by prevailing non-government parties in the case of civil forfeitures. Because this liability is unrelated to the strength or weakness of the Government’s case and is now a routine part of civil litigation in forfeiture cases, the awards of attorneys’ fees and costs will no longer come from the AFF. Although the language of the statute is silent as to the source of funding for these payments, Congressman Henry Hyde addressed this issue. Submitted in the Congressional Record on the day CAFRA was passed was the following statement:

In addition, this act would make the federal government liable for...attorneys fees, and pre-judgment and post-judgment interest payments on certain assets to prevailing parties in civil forfeiture proceedings.... Compensation payments could come from appropriated funds or occur without further appropriation from the Judgment Fund, or both sources.⁵

Since the AFF consists of non-appropriated funds, and no funds were separately appropriated to pay obligations arising under CAFRA, it seems clear that Congress’s intent is that in civil forfeiture proceedings attorneys’ fees, costs, and interest should be awarded from the Judgment Fund.

C. Procedure for requesting payment of an award from the Judgment Fund

When there is a judgment awarding attorneys’ fees, interest, and costs in a civil forfeiture case, the U.S. Attorney’s Office (USAO) should submit a request for payment of the award to the Financial Management Service (FMS), Department of the Treasury, which manages the Judgment Fund. The FMS website, found at <http://www.fms.treas.gov/judgefund/forms.html>, has links to procedures for submitting a request for an award of costs and fees and to the appropriate forms. In addition to the forms and instructions, the FMS website also contains general information about the fund. Upon submitting the appropriate forms to FMS, a courtesy copy should be forwarded to AFMLS.

II. Payment of Attorneys’ Fees in Criminal Forfeiture Cases

A. Defendant’s attorneys’ fees

A.1 Summary

The defendant in a criminal forfeiture action may file for an award of attorneys’ fees only under the Hyde Amendment.⁶ A motion for fees and costs filed in a civil forfeiture case under CAFRA cannot include fees and costs incurred in even a directly related criminal proceeding.⁷ The Hyde Amendment provides that the court may award attorneys’ fees to defendants in criminal actions in which the Government’s position was vexatious, frivolous, or in bad faith.⁸ To prevail on a Hyde Amendment

⁵ *Congressional Budget Office Cost Estimate: H.R. 1658 - The Civil Asset Forfeiture Reform Act of 2000*, reprinted in 146 Cong. Rec. H2040, H2047–H2049 (daily ed. Apr. 11, 2000).

⁶ “During fiscal year 1998 and in any fiscal year thereafter, the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of enactment of this Act [Nov. 26, 1997], may award to the prevailing party, other than the United States, a reasonable attorney’s fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust.” The Hyde Amendment to the Department of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997), reprinted in 18 U.S.C.A. § 3006A, historical and statutory notes.

⁷ See *United States v. Certain Real Property, Located at 317 Nick Fitchard Road, N.W., Huntsville, AL*, 579 F.3d 1315 (11th Cir. 2009).

⁸ Hyde Amendment, *supra* note 7.

claim, the defendant must prove that (1) he or she was the prevailing party on the underlying action; (2) the Government's position was vexatious, frivolous, or in bad faith; and (3) there are no special circumstances that would make the award unjust. This burden is heavier than the one the Government must meet under EAJA, 28 U.S.C. § 2412, for civil actions.⁹ When a request for attorneys' fees under the Hyde Amendment is made based on the criminal prosecution, it should be submitted directly to the Hyde Amendment Committee and the Executive Office for U.S. Attorneys. If the request specifically addresses the criminal forfeiture, a copy should also be submitted to the Chief of AFMLS. Hyde Amendment claim awards are paid from the Judgment Fund.

A.2 Discussion

In articulating a standard of misconduct, the Eleventh and Fourth Circuits have relied on *Black's Law Dictionary* to define the terms "vexatious," "frivolous," and "bad faith."¹⁰ These courts found *vexatious* to mean "without reasonable or probable cause or excuse"; *frivolous* to mean "groundless... with little prospect of success; often brought to embarrass or annoy"; and *bad faith* to mean "not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity."¹¹

In *United States v. Tucor Int'l, Inc.*, the court held that the language of the Hyde Amendment indicates that the test for "vexatious, frivolous, or in bad faith" is disjunctive and satisfaction of any of the three criteria is sufficient to justify an award.¹² In determining whether the Government's position during prosecution supported an award of attorneys' fees under the Hyde Amendment, the court in *United States v. Sherburne* examined the "vexatious" prong and set forth the standard to be used by courts in their analysis.¹³ The court held that for the purposes of the Hyde Amendment, (1) the Government's conduct must include an element of maliciousness, or intent to harass or annoy and, (2) the suit must be objectively deficient in that lacks merit.¹⁴ The test is whether the prosecution was unwarranted because it was intended to harass and without sufficient foundation.¹⁵ The amendment was "targeted at prosecutorial misconduct, not prosecutorial mistake."¹⁶

A court recently considered a defendant's claim for attorneys' fees in a criminal forfeiture case where the forfeiture, but not the conviction, was found defective.¹⁷ In *United States v. Pease*, the defendant

⁹ See *United States v. Gilbert*, 198 F.3d 1293, 1299-1302 (11th Cir. 1999) (discussing legislative history of the Hyde Amendment). In its original form, the Hyde Amendment tracked the EAJA in its burden and standard of proof, but was changed prior to enactment by switching the burden from the Government to the plaintiff and heightening the standard of misconduct that must be shown. *Id.* at 1302. See also *United States v. Wade*, 255 F.3d 833, 839 n.6 (D.D.C. 2001) (discussing in footnote that the Hyde Amendment is a heavier burden for petitioner than the EAJA standard).

¹⁰ *Gilbert*, 198 F.3d at 1299 (11th Cir. 1999); See also *In re 1997 Grand Jury*, 215 F.3d 430, 437 (4th Cir. 2000).

¹¹ *Gilbert*, 198 F.3d at 1298-99 (quoting *Black's Law Dictionary* 668 (6th Ed. 1990); *In re 1997 Grand Jury*, 215 F.3d at 436 (quoting *United States v. Gilbert*, 198 F.3d 1293, 1298-99 (11th Cir. 1999)). Accord *United States v. Braunstein*, 281 F.3d 982, 994-95 (9th Cir. 2002) (following *Gilbert* in defining the term "frivolous"). Other courts have adopted slightly different definitions of the statutory terms. See, e.g., *United States v. Knott*, 256 F.3d 20, (1st Cir. 2001) (vexatiousness for purposes of the Hyde Amendment requires "both a showing that the criminal case was objectively deficient, in that it lacked either legal merit or factual foundation, and a showing that the government's conduct, when viewed objectively, manifests maliciousness or an intent to harass or annoy"). Accord *United States v. Heavrin*, 330 F.3d 723, 729 (6th Cir. 2003). Thus, it is imperative to check for controlling circuit law in litigating any issues under the Hyde Amendment.

¹² *United States v. Tucor Int'l, Inc.*, 238 F.3d 1171, 1178 (9th Cir. 2001).

¹³ *United States v. Sherburne*, 249 F.3d 1121, 1126-1128 (9th Cir. 2001).

¹⁴ *Id.* at 1127.

¹⁵ *Id.*

¹⁶ *Gilbert*, 198 F.3d at 1304.

¹⁷ *United States v. Pease*, 137 Fed. Appx. 220, 222-223 (11th Cir. 2005).

sought attorneys' fees in connection with an appeal of the criminal forfeiture. The Eleventh Circuit reversed the district court's grant of the Government's Rule 36 motion to amend the judgment post-conviction to include the necessary forfeiture language. In connection with the Hyde Amendment request, the district court found that the Government's position was not vexatious, frivolous, or in bad faith.¹⁸ The court reasoned that the lack of clarity of the governing law regarding the use of Rule 36 to amend judgments to include previously ordered forfeitures, the legal merits of the forfeiture, and the consistency of the Government's position supported a finding that the Government's position was substantially justified—not frivolous, vexatious, or in bad faith.¹⁹

Although there are no reported decisions granting a Hyde Amendment claim solely with regard to a criminal forfeiture, the analysis conducted by courts in granting Hyde Amendment claims generally is instructive. In *United States v. Adkinson*, the court found that the Government acted in bad faith when they indicted a party to the Hyde Amendment action knowing at the time of the indictment that there would be insufficient evidence to convict the defendants of bank fraud conspiracy at trial.²⁰ Furthermore, the court found the Government's position in that case to be foreclosed by binding precedent from the start, thus making it vexatious and frivolous as well.²¹

Despite arising from a criminal action, most courts have found a Hyde Amendment action to be a civil proceeding. As a result, the Federal Rules of Civil Procedure apply to Hyde Amendment actions.²² Moreover, the Hyde Amendment provides that the procedures and limitations for granting an award shall be derived from those set forth in EAJA.²³ In pertinent part, EAJA requires the parties seeking an award to file their claims within 30 days of final judgment of the underlying civil action.²⁴ EAJA also provides for the determination of reasonable attorneys' fees and other expenses.²⁵

B. Third party petitioner's attorneys' fees

B.1 Summary

Since CAFRA strictly applies to civil forfeiture proceedings, the third party petitioner in an ancillary proceeding to a criminal forfeiture, pursuant to 21 U.S.C. § 853(n), must assert payment for attorneys' fees under EAJA.²⁶ EAJA provides for the award of attorneys' fees to prevailing parties in any civil

¹⁸ *Id.* at 226.

¹⁹ *Id.* at 224-226. The district court also denied the claimant's request for attorneys' fees under EAJA, finding that the Government's position was substantially justified.

²⁰ *United States v. Adkinson*, 247 F.3d 1289, 1293 (11th Cir. 2001).

²¹ *Id.*

²² *United States v. Braunstein*, 281 F.3d 982, 994 (9th Cir. 2002); *United States v. Holland*, 214 F.3d 523 (4th Cir. 2000); *United States v. Truesdale*, 211 F.3d 898, 902-904 (5th Cir. 2000); *United States v. Wade*, 255 F.3d 833, 839 (D.D.C. 2001). But see *United States v. Robbins*, 179 F.3d 1268, 1270 (10th Cir. 1999) (finding a Hyde Amendment action was a criminal proceeding to which the appellate rule for criminal actions applies).

²³ "Such awards shall be granted pursuant to the procedures and limitations (but not burden of proof) provided for an award under Title 28, U.S.C. § 2412." Hyde Amendment, *supra* note 7.

²⁴ 28 U.S.C. § 2412(d)(1)(B).

²⁵ 28 U.S.C. § 2412(d)(2)(A).

²⁶ See *United States v. Moser*, 586 F.3d 1089, 1092-96 (8th Cir. 2009) (prevailing third party in ancillary proceeding is not entitled to recover attorneys' fees under CAFRA). Accord *United States v. Nolasco*, 354 F. App'x 676, 679-81 (3d Cir. 2009).

action against the United States in which the Government's position was not substantially justified.²⁷ A third party claimant's ancillary proceeding to a criminal forfeiture is considered a "civil action" under EAJA.²⁸ Payment of attorneys' fees awarded under EAJA is made from the AFF. The Chief of AFMLS must approve any settlement of an EAJA claim.

B.2 Discussion

EAJA requires the court to award fees upon finding (1) the applicants were the prevailing parties, (2) the Government's position was not substantially justified, and (3) no circumstances exist that would make an award unjust.²⁹

The general test for determining whether an applicant is a prevailing party is if the parties "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."³⁰ The Supreme Court has held that a party must secure a judgment on the merits or by judicial consent decree in order to prevail under statutes awarding attorneys' fees.³¹ The court stated that these results create the "material alteration of the legal relationship of the parties" necessary to permit an award of attorneys' fees.³² Therefore, to meet the prevailing party requirement under EAJA, a petitioner must achieve some benefit of the litigation either through a judgment on the merits or a judicial consent decree.

In *United States v. One Rural Lot*,³³ the claimants were prevailing parties where they received 60 percent of the sale proceeds from forfeited property. Likewise, the property owner in *In Re Application of Gerard Mgndichian*³⁴ prevailed for EAJA purposes where the district court denied his motion for return of his motorcycles, but nonetheless ordered the administrative forfeiture proceedings void,³⁵ giving him the right to contest the reinstated forfeiture proceedings.³⁶

For the Government's position to be substantially justified, the Government must show it was "justified to a degree that could satisfy a reasonable person"³⁷; that is, its position had a "reasonable basis both in law and fact."³⁸ Relevant factors that may be considered in determining whether the Government's position was reasonable include (1) the legal merits of its position, (2) the clarity of the governing law at the time the action was instituted, (3) the stage at which the litigation was resolved, and (4) the consistency of the Government's position.³⁹

²⁷ "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A).

²⁸ *United States v. Douglas*, 55 F.3d 584, 587 (11th Cir. 1995); *United States v. McAllister*, 1998 WL 855498, at *3 (E.D. Pa. 1998); *United States v. Bachner*, 877 F. Supp. 625, 627 (S.D. Fla 1995).

²⁹ *Jean v. Nelson*, 863 F.2d 759, 765 (11th Cir. 1988).

³⁰ *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); see also *Rhoten v. Brown*, 854 F.2d 667, 669 (4th Cir. 1988); *Sims v. Apfel*, 238 F.3d 597, 600 (5th Cir. 2001).

³¹ *Buckhannon Board and Care Home, Inc. v. West Va. Dept. of Health and Human Resources*, 532 U.S. 598, 604-605 (2001); see also *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 944-48 (D.C. Cir. 2005).

³² *Buckhannon Board and Care Home, Inc.* at 604.

³³ *United States v. One Rural Lot*, 770 F. Supp. 66 (D.P.R. 1991).

³⁴ *In re Application of Gerard Mgndichian for Return of Property*, 312 F. Supp. 2d 1250 (C.D. Cal. 2003).

³⁵ *Id.* at 1260.

³⁶ *Id.* at 1257-60.

³⁷ *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

³⁸ *Id.*

³⁹ *Id.* at 568-70.

III. Forfeiture of Attorneys' Fees

The policy on the forfeiture of attorneys' fees is set forth in the *U.S. Attorney's Manual*.⁴⁰ As set forth in those sources, any action to forfeit attorneys' fees in a civil or criminal case, as well as any agreement *not* to seek forfeiture of attorneys' fees in such case, requires the approval of the Assistant Attorney General for the Criminal Division.

⁴⁰ See *U.S. Attorney's Manual*, § 9-120.000 *et seq.*

Chapter 8: Grand Jury

I. Disclosures of Grand Jury Information Under 18 U.S.C. § 3322(a)

A. Summary

The Civil Asset Forfeiture Reform Act (CAFRA) of 2000 amended 18 U.S.C. § 3322(a) to allow criminal Assistant U.S. Attorneys (AUSAs) to disclose grand jury information to attorneys for the Government “for use in connection with any civil forfeiture provision of federal law.” With this amendment, Congress legislatively overruled a portion of the holding in *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983), which interpreted Rule 6(e), Fed. R. Crim. P., to prohibit a criminal AUSA from disclosing grand jury information to a civil AUSA who was not part of the prosecution team. However, the amendment to section 3322 did not make clear whether the “use” that the civil AUSA could make of the disclosed information included further disclosure to the public in the course of the litigation of a civil forfeiture case without obtaining a court order.

One interpretation of section 3322(a) is that it only permits one AUSA to disclose grand jury information to another AUSA, but still requires the second AUSA to obtain a court order before disclosing the information to the public in the course of civil litigation. The matter is a sensitive one, as the penalty for violating the grand jury disclosure rules set forth in Rule 6(e) is contempt. For that reason, prosecutors will naturally want to act with caution in this area.

However, based on fundamental rules of statutory construction and the practice regarding the use of grand jury information in criminal cases, we conclude that the intent of section 3322 was to permit the civil AUSA not only to review and rely upon grand jury information in the preparation of civil forfeiture pleadings, but also to disclose that information in publicly filed documents and as evidence at trial.

Section 3322 does not, however, permit any AUSA to disclose grand jury information to seizing agency attorneys to use in administrative forfeiture proceedings. Seizing agency attorneys are not “attorneys for the government” as defined by Rule 1(b), of the Federal Rules of Criminal Procedure. Nor does section 3322 authorize disclosure to government contractors without a court order pursuant to Rule 6(e)(3)(E)(i) and/or 6(e)(3)(A)(ii).¹

B. Discussion

B.1 Issue I

May an AUSA to whom grand jury information is disclosed for use in a civil forfeiture matter disclose that information to the public in the course of the civil forfeiture case without obtaining a court order?

¹ Rule 6(e)(3)(A)(ii) authorizes disclosure to “government personnel,” which may include contract personnel, but only upon court order as discussed below. Rule 6(e)(3)(E)(i) authorizes disclosure “preliminary to or in connection with a judicial proceeding” and also requires a court order.

CAFRA² amended section 3322(a)³ to allow a criminal AUSA to disclose grand jury information without obtaining a judicial order to a civil AUSA for “use in connection with any civil forfeiture provision of Federal law.” This amendment was intended to address the Supreme Court decision in *United States v. Sells Engineering*, which held that Rule 6(e) of the Federal Rules of Criminal Procedure does not authorize automatic disclosures of grand jury information to an attorney for the Government for use in a civil proceeding. The Supreme Court interpreted Rule 6(e) to allow automatic disclosures only to those attorneys and their supervisors who conduct the criminal matters to which the grand jury materials pertain.⁴ An attorney with only civil duties, the court said, lacks both the prosecutor’s special role in supporting the grand jury and the prosecutor’s own crucial need to know what occurs before the grand jury.⁵ Thus, criminal AUSAs were held to have access to grand jury materials only for criminal use.

The Supreme Court refined its decision in *United States v. John Doe, Inc. I*, 481 U.S. 102 (1987), which held that civil attorneys who were members of the prosecution team may, without prior court authorization, continue to use materials or information subject to Rule 6(e) in a companion or related civil proceeding. A recent Third Circuit case, *Impounded*, 277 F.3d 407 (3d Cir. 2002), further lightened the restrictions of *Sells*. The Third Circuit, interpreting an exception to the general non-disclosure rule, allowed an AUSA from one district to disclose grand jury material to an AUSA in another district since the use of the grand jury information was a part of the performance of the recipient prosecutor’s criminal law enforcement duties.

The CAFRA amendment to section 3322(a) expanded the holding in *John Doe, Inc. I* to allow disclosure of grand jury information to another “attorney for the government” without a court order for “use in connection with any civil forfeiture provision of federal law.” Previously, under the version of section 3322 enacted as part of the Financial Institutions Reform and Recovery Act (FIRREA) of 1989, Congress had authorized such disclosure only in cases involving bank fraud. However, the legislative history of CAFRA indicates that Congress recognized that *all* civil forfeiture actions are law enforcement actions, and that grand jury information therefore should be available without a court order to government attorneys in all civil forfeiture cases.⁶

While it is clear that Congress intended to permit an AUSA who obtained grand jury information in connection with a criminal investigation to disclose that information to another AUSA who would be handling a related civil forfeiture matter, neither the statute nor the legislative history provides any guidance as to what the civil AUSA may do with the information once it is disclosed. In particular, it is not clear whether Congress intended to permit the civil AUSA only to review and rely upon the grand jury information while preparing a civil forfeiture case, or whether it intended that the civil AUSA would be permitted to disclose the grand jury information in publicly filed documents, such as complaints and applications for seizure warrants and restraining orders, and as evidence at trial.

² CAFRA applies to any forfeiture proceeding initiated on or after August 23, 2000. *See* Pub. L. No. 106-185, § 10, 114 Stat. 202, 217.

³ Section 3322(a) provides:

(a) a person who is privy to grand jury information—
 (1) received in the course of duty as an attorney for the government; or
 (2) disclosed under rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure;
may disclose that information to an attorney for the government for use in...connection with any civil forfeiture provision of Federal law.

⁴ *United States v. Sells Engineering*, 463 U.S. at 429.

⁵ *Id.* at 431.

⁶ H.R. Rep. 105-358(I), 105th Cong., 1st Sess. 1997.

A fundamental rule of statutory construction provides that the plain meaning of the words is given the greatest weight in statutory interpretation. *Browder v. United States*, 312 U.S. 335, 338 (1941). In the context of civil litigation, the plain meaning of the phrase “for use in connection with any civil forfeiture provision of federal law” would include using the information in applications for seizure warrants and court orders, in the body of the forfeiture complaint, and as evidence at trial. This comports with the dictionary definition, which suggests that information is *used* when it is “put into action or service.”⁷ The more limited interpretation—that one “uses” information only to inform him or herself of the facts of a case—is contrary to common sense and experience. Moreover, the broader reading of the statute is consistent with the use that a criminal AUSA typically makes of grand jury information in a criminal case. It is well established that a criminal AUSA who is privy to grand jury information may use it not only to prepare a case for trial, but may also disclose it in the indictment and in the course of the criminal trial.

Accordingly, we conclude that just as the criminal AUSA may disclose grand jury information in an indictment or other document filed in the course of a criminal prosecution, or as evidence introduced in the course of a criminal trial, so may a civil AUSA disclose grand jury information in the course of civil litigation without obtaining a judicial disclosure order.

B.2 Issue II

May an AUSA (civil or criminal) who is privy to grand jury information disclose that information to agency counsel for use in connection with an administrative proceeding, or to a government contractor who is assisting in the preparation of a civil forfeiture case?

Section 3322(a) provides for automatic disclosures of grand jury information by an AUSA who is privy to that information “to an attorney for the government...for use in connection with any civil forfeiture provision of Federal law.” Rule 1(b) of the Federal Rules of Criminal Procedure defines attorney for the Government as the Attorney General, an authorized assistant of the Attorney General, a U.S. Attorney, or an authorized assistant of a U.S. Attorney. Department of Justice (DOJ) attorneys may conduct grand jury proceedings when authorized to do so by the Attorney General. Agency or other non-DOJ attorneys may not be present unless they are appointed as special assistants.⁸

In *In re Grand Jury Proceedings*,⁹ the Third Circuit emphasized that the “term ‘attorneys for the government’ is restrictive in its application.” The Court concluded that “if it had been intended that attorneys for administrative agencies were to have free access to matters occurring before the grand jury the rule would have so provided.” The Sixth Circuit, addressing the definition of *attorney for the Government*, found that an attorney for DOJ’s Tax Division was not an attorney for the Government because he was not assigned to work on a particular criminal case in any “official” capacity.¹⁰ Seizing agency attorneys and non-DOJ attorneys may obtain grand jury information without a disclosure order if they are appointed under 28 U.S.C. § 515 as a Special Assistant U.S. Attorney or Special Assistant to the Attorney General.¹¹ Otherwise, they are not considered “attorneys for

⁷ Webster’s Dictionary 1301 (10th ed. 1999).

⁸ *Federal Grand Jury Practice* (OLE February 2008), chap. 2, sec.12.

⁹ *In re Grand Jury Proceedings*, 309 F.2d 440, 443 (3d Cir. 1962).

¹⁰ *United States v. Forman*, 71 F.3d 1214, 1218 (6th Cir. 1995).

¹¹ *In re Perlin*, 589 F.2d 260, 267 (7th Cir. 1978) (Commodity Futures Trading Commission); *United States v. Bates*, 627 F.2d 349 (D.C. Cir. 1980) (Federal Maritime Commission); *Bradley v. Fairfax*, 634 F.2d 1126, 1130-32 (8th Cir. 1980) (Parole Commission hearing officer).

the Government” and cannot receive grand jury information without a court order. As a result, we conclude that section 3322 does not authorize disclosure of grand jury information to a seizing agency counsel for use in connection with an administrative proceeding.

Likewise, we conclude that section 3322 does not authorize disclosure without a court order to government contractors who are assisting the civil AUSA with the preparation of the civil forfeiture case. At first glance, disclosure to the contractor paralegal or attorney who is doing the actual drafting of the document that the civil AUSA is planning to file in the civil forfeiture case would seem to fall within the scope of the use that the civil AUSA may make of the grand jury information. If the civil AUSA, for example, may disclose the grand jury information in the publicly filed civil forfeiture complaint, there would seem to be no reason he or she could not first disclose it to the contractor who is drafting the complaint. Nonetheless, the practice in criminal cases militates against this view.

Rule 6(e)(3)(A)(ii) allows for disclosure of grand jury information without judicial order to “any government personnel...that an attorney for the government considers necessary to assist in performing that attorney’s duty to enforce federal criminal law.” The term *government personnel* includes not only members of the prosecution support staff, such as economists, secretaries, paralegals, law clerks, and federal criminal investigators, but also employees of any federal agency who are assisting the government prosecutor.¹² However, it does not automatically include contractor personnel used in the Asset Forfeiture Program.

It is true that contract personnel have been considered government personnel for purposes of Rule 6(e) in previous instances. In *United States v. Lartey*,¹³ the Second Circuit held that a retired IRS agent employed as a contractor to review financial records of the defendant, which were submitted to the grand jury, fell within the government employee exception to the grand jury secrecy rule. Relying on *In re Gruberg*,¹⁴ and legislative history,¹⁵ the court found that the exceptions to the grand jury rules were adopted to override decisions highly restrictive of the use of government experts in grand jury investigations. In a similar case, the Tenth Circuit, relying on *Lartey*, held that an expert witness under contract with the Government was government personnel within the class of government personnel to whom disclosure is permissible.¹⁶

In *United States v. Pimental*,¹⁷ the most recent case to address this issue, the court concluded that temporary employees or persons under contract, including employees of a private company, can be “government personnel” for purposes of Rule 6(e)(3)(A)(ii), where the individuals in question are directly involved in assisting government attorneys in the prosecution of cases. However, the court held that the prosecutor “must seek court authorization” prior to disclosure to such persons.¹⁸

Therefore, in both civil and criminal cases, the AUSA must first obtain a disclosure order pursuant to either Rule 6(e)(3)(A)(ii) or Rule 6(e)(3)(E)(i) before disclosing grand jury information to a contract

¹² *Federal Grand Jury Practice* (OLE February 2008), chap. 3, sec. 26.

¹³ *United States v. Lartey*, 716 F.2d 955 (2d Cir. 1983).

¹⁴ *In re Gruberg*, 453 F. Supp. 1225, 1233-34 (S.D.N.Y. 1978).

¹⁵ S. Rep. No. 354, 95th Cong., 1st Sess. 7 (1977), reprinted in U.S. Code Cong. & Ad. News 527, 530.

¹⁶ *United States v. Anderson*, 778 F.2d 602 (10th Cir. 1985).

¹⁷ *United States v. Pimental*, 380 F.3d 575, 590-96 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 1385 (Feb. 22, 2005),

¹⁸ 380 F.3d at 596.

employee,¹⁹ being mindful of any required showings under these provisions.²⁰ Accordingly, it will remain necessary to obtain a disclosure order before a civil AUSA, who is entitled under section 3322(a) to use grand jury information in a civil forfeiture case, may disclose that information to a government contractor unless the information is first disclosed in a publicly filed document or in open court.

C. Conclusion

Under the CAFRA amendment to section 3322(a), criminal AUSAs may now disclose grand jury information to civil forfeiture AUSAs. This information may be used by the civil AUSAs in their complaints, restraining orders, and any other pleadings filed in a civil forfeiture case, and as evidence at trial, without getting a disclosure order. However, neither criminal nor civil AUSAs may disclose grand jury information to seizing agency attorneys to use in administrative forfeiture proceedings or to government contract employees who may be assisting in the preparation of a civil forfeiture case without obtaining a judicial order.

II. Presenting Forfeiture to the Grand Jury

Federal Rule of Criminal Procedure 32.2(a) provides that the court may not enter a judgment of forfeiture in a criminal proceeding “unless the indictment or information contains notice to the defendant that the Government will seek the forfeiture of property as part of any sentence in accordance with the applicable statute.” Fed. R. Crim. P. 32.2(a). In light of this rule and related constitutional considerations, what are the best practices for AUSAs to follow in presenting forfeiture allegations and related evidence to the grand jury, and how should the grand jury’s finding of probable cause for forfeiture be memorialized and described to the district court?

A. Summary

Because forfeiture is neither an offense nor an element of an offense, but an indeterminate part of the criminal sentence not limited by any statutory maximum amount, the Constitution does not require that the grand jury find probable cause for forfeiture, either generally or with respect to particular property. In addition, the applicable statutes and rules do not mandate such a finding by the grand jury. For several reasons, however, the best practice is to present evidence to the grand jury that permits it to find probable cause to believe that the requisite nexus exists between the charged offenses and any money judgment amount and particular property alleged to be forfeitable, and to request that such a finding be made. The grand jury’s finding with respect to forfeiture should be memorialized in the indictment and may then be represented to the court in support of pre-trial restraining orders or for other appropriate purposes, as the grand jury’s probable cause finding on the forfeitability of the listed property and the specified money judgment amount.

¹⁹ The practice in a number of districts has been to obtain a standing order from the district court, under either Rule 6(e)(3)(A)(ii) or Rule 6(e)(3)(E)(i), or both, authorizing disclosure to specific contract personnel who are directly involved in assisting attorneys for the Government in the prosecution of cases. Such orders should be updated frequently to reflect any changes in conditions which were considered by the court in support of the order.

²⁰ Compare *In re Grand Jury Matter*, 607 F. Supp. 2d 273, 276-77 (D. Mass. 2009) (denying disclosure to contractor on grounds that the contractor was not the equivalent of government personnel and that particularized need had not been shown) with *In re Disclosure of Matters Occurring Before a Grand Jury to Litigation Technology Service Center*, 2011 WL 3837277 (D. Haw. Aug. 25, 2011) (authorizing disclosure on grounds that contractor employees are equivalent of government personnel).

B. Discussion

B.1 The Constitution does not require a grand jury finding of probable cause for forfeiture

The authority to charge crimes in federal court, and the limits to that authority, derives from the Constitution. The Fifth Amendment provides, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” The grand jury clause of the Fifth Amendment serves the “dual function of determining if there is probable cause to believe that a crime has been committed, and of protecting citizens against unfounded criminal prosecutions.” *Branzburg v. Hayes*, 408 U.S. 665, 686-687 (1972). Thus, elements of the criminal offense must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt. *See, e.g., Jones v. United States*, 526 U.S. 227, 232 (1999); *see generally* chapter 11, section 1, *Federal Grand Jury Practice* (OLE February 2008).

There is no constitutional right to have the grand jury make a probable cause determination as to criminal forfeiture because forfeiture is not an element of a substantive offense. Criminal forfeiture is, instead, part of a criminal sentence. *Libretti v. United States*, 516 U.S. 29, 38-41, 48-50 (1995). Indeed, for that reason, there is no Sixth Amendment right to jury trial on criminal forfeiture. *Id.* at 49-50.²¹

Notwithstanding recent Supreme Court decisions holding that certain facts bearing upon sentencing constitute elements of separate substantive offenses, *Libretti* is apparently still good law. In *Jones v. United States*, the Court held that the federal carjacking statute, which authorized increased punishment in carjackings resulting in either serious bodily injury or death, created three separate offenses rather than one offense with additional penalty provisions. *Jones*, 526 U.S. at 251-52. In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Court held that “other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”²² In *Blakely v. Washington*, 542 U.S. 296 (2004), the Court applied the *Apprendi* rule to invalidate, under the Sixth Amendment, an upward departure under the Washington State sentencing guidelines system that was imposed on the basis of facts found by the court at sentencing.²³

In *United States v. Messino*, 382 F.3d 704 (7th Cir. 2004), the first court of appeals to reach and decide the issue of *Blakely*’s application to criminal forfeiture, explained:

We have previously held that *Apprendi* has no effect on criminal forfeiture proceedings because forfeiture provisions have no statutory maximum. *United States v. Vera*, 278 F.3d 672, 673 (7th Cir. 2002). *Apprendi*’s statutory maximum was supplied by the statute of conviction; *Blakely*’s is external—the statutory maximum is found not in the criminal code, but instead, the sentencing guidelines. *See [United States v.] Booker*, 375 F.3d 508, 509 [(7th Cir. 2004)]. The criminal

²¹ As explained more fully below, the Federal Rules of Criminal Procedure provide that in a case where a jury returns a guilty verdict, either the defense or the prosecution may request that the jury also determine whether the Government has established the “requisite nexus” between the property alleged to be forfeitable and the offense committed by the defendant. Fed. R. Crim. P. 32.2(b)(5).

²² In response to *Jones* and *Apprendi*, the Criminal Division advised prosecutors “Any fact which increases the statutory maximum sentence (other than prior conviction) should be charged in the indictment and proved at trial, and the [trial] jury should be instructed that it is required to find the fact beyond a reasonable doubt.” USA Book, <http://dojnet.doj.gov/usao/eousa/ole/usabook/narc/apprendi/0728memo.htm>.

²³ DOJ has taken the position that *Blakely* does not apply to the U.S. Sentencing Guidelines, a question on which the Court has granted certiorari. *See* USA Book, <http://dojnet.doj.gov/usao/eousa/ole/blakely-dagmemo.pdf>.

forfeiture provisions do not include a statutory maximum; they are open-ended in that *all* property representing proceeds of illegal activity is subject to forfeiture. *Vera*, 278 F.3d at 673; U.S.S.G. § 5E1.4; 21 U.S.C. § 853. Therefore, we conclude that *Blakely*, like *Apprendi*, does not apply to forfeiture proceedings.

382 F.3d at 713. The court of appeals added the following defense of the preponderance standard for criminal forfeiture:

Libretti states that “the nature of criminal forfeiture as an aspect of sentencing compels the conclusion that the right to jury verdict on forfeitability does not fall within the Sixth Amendment’s constitutional protection.” *Libretti v. United States*, 516 U.S. 29, 49 (1995). Furthermore, the Supreme Court’s decision in *Patterson* explains that, “the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.” *Patterson v. New York*, 432 U.S. 197, 210 (1977). Since forfeiture is not a separate substantive offense, *Libretti*, 516 U.S. at 39-40, due process is also not offended by a preponderance standard.

Messino, 382 F.3d at 713-14.

Other lower courts have uniformly held that *Blakely*’s predecessor, *Apprendi*, does not apply to criminal forfeiture because forfeiture has no statutory maximum amount. *See United States v. Shryock*, 342 F.3d 948, 991 (9th Cir. 2003); *United States v. Keene*, 341 F.3d 78, 85 (1st Cir. 2003); *United States v. Gasanova*, 332 F.3d 297, 300-01 (5th Cir. 2003); *United States v. Najjar*, 300 F.3d 466, 485-86 (4th Cir. 2002); *United States v. Corrado*, 227 F.3d 543, 550-51 (6th Cir. 2000) (*Corrado I*); *United States v. Corrado*, 286 F.3d 934, 937 (6th Cir. 2002) (*Corrado II*) (reaffirming, in related opinion, that forfeiture is part of the defendant’s sentence); *United States v. Cabeza*, 258 F.3d 1256, 1257 (11th Cir. 2001).

Accordingly, a defendant has no constitutional right to have the grand jury find probable cause for forfeiture.²⁴

B.2 Criminal forfeiture statutes and the Federal Rules of Criminal Procedure do not require that the grand jury find probable cause for forfeiture

If the Constitution does not require the grand jury to find probable cause for forfeiture, does a statute or rule require it?

Criminal forfeiture statutes typically provide that the court, “in imposing sentence on a person convicted of [the predicate] offense..., shall order that the person forfeit to the United States [specified types of property],” 18 U.S.C. § 982(a)(1), or its equivalent, “Any person convicted of a

²⁴ Of course, the defendant *does* have a right to indictment and a grand jury finding on the elements of the substantive offense(s) that are predicates for forfeiture. As a recent reminder of the importance of charging all applicable substantive legal theories, and the effect upon forfeiture of a failure to do so, *see United States v. Iacaboni*, 363 F.3d 1, 7 (1st Cir. 2004) (reversing forfeiture judgment based on theory that assets had facilitated money laundering with intent to conceal where indictment charged only money laundering with intent to promote criminal activity). A fact that triggers an enhanced forfeiture penalty, greater than the penalty that would otherwise apply to a given offense, would also seem to qualify as an element of the substantive offense within the meaning of *Apprendi*. *See* 18 U.S.C. § 981(a)(1)(G), made applicable in criminal cases by 28 U.S.C. § 2461(c), (providing for forfeiture of *all* assets of any individual, entity, or organization engaged in certain crimes, but only if the crimes are acts of domestic or international terrorism as defined in 18 U.S.C. § 2331); *see also* 18 U.S.C. § 2332b(g)(5) (defining numerous offenses as “Federal crimes of terrorism” if they are “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct”).

[predicate offense] shall forfeit to the United States [specified types of property],” 21 U.S.C. § 853(a). *See also* 28 U.S.C. § 2461(c) (“If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment or information with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the government may include the forfeiture in the indictment or information in accordance with the Federal Rules of Criminal Procedure, and upon conviction, the court shall order the forfeiture of the property in accordance with...(21 U.S.C. § 853), other than subsection (d) of that section.”).

Such criminal forfeiture statutes do not address grand jury process with respect to forfeiture, however, the Rules Committee determined that Rule 7(c)(2), dealing with the contents of the indictment, would only require notice of forfeiture, while Rule 31, dealing with jury verdicts at trial, required only the trial jury to return a special forfeiture verdict.²⁵

B.3 Although the Constitution, statutes, and rules do not require a grand jury finding of probable cause for forfeiture, the best practice is to request such a finding

Although neither the Constitution, nor the forfeiture statutes, nor the rules require it, it is best to ask the grand jury to find that there is probable cause to believe that the requisite nexus exists between the offenses charged in the indictment and the assets allegedly subject to criminal forfeiture, at least in cases where the indictment identifies specific forfeitable property or a specific amount due as a forfeiture money judgment.

Such a finding serves several useful purposes.

First, the finding provides a basis for restraining directly forfeitable assets identified in the indictment.²⁶ Section 853(e)(1)(A) provides for entry of a post-indictment restraining order “upon the filing of an indictment or information charging a violation...for which criminal forfeiture may be ordered...and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section.” Section 853(e)(1)(A). The legislative history of section 853 indicates that Congress intended for the grand jury’s finding in support of forfeiture to be given considerable weight:

For the purposes of issuing a restraining order, the probable cause established in the indictment or information is to be determinative of any issue regarding the merits of the government’s case on which the forfeiture is to be based.

S. Rep. No. 225, 98th Cong., 2d Sess. 203 (1984), reprinted in 1984 U.S. Code Cong. & Administrative News 3182, 3386.

²⁵ The decision to require a special forfeiture finding only by the trial jury was made even though the Rules Committee assumed in 1972—contrary to the holding of *Libretti* decades later—that the amount of the interest or property subject to criminal forfeiture was “an element of the offense to be alleged and proved.” Advisory Committee Note to 1972 Amendment to Fed. R. Crim. P. 31(e). The reference to forfeiture was deleted from Rule 31 in 2000 in light of the creation that year of Rule 32.2, covering most aspects of criminal forfeiture procedure. Rule 32.2(b) was specifically intended to replace the special verdict requirement of Rule 31(e), a requirement that generated confusion over the scope of the determination to be made by the trial jury. Rule 32.2(b) provides instead that the court, or the jury upon a request by the Government or the defendant, must determine whether the Government has established the requisite nexus for forfeiture. *See* Advisory Committee Note to 2000 Adoption of Fed. R. Crim. P. 32.2(b).

²⁶ Identified substitute assets may also be restrained in the Fourth Circuit. *In re Assets of Billman*, 915 F.2d 916, 919, 920-21 (4th Cir. 1990).

Although section 853 provides that the court “may” enter a post-indictment restraining order upon the Government’s application, suggesting a certain amount of discretion, the Supreme Court in *United States v. Monsanto*, 491 U.S. 600, 612-14 (1989), made it clear that government applications for such orders should generally be granted, ruling that it was error to import “traditional principles of equity” and equitable balancing tests into the process of issuing and reviewing forfeiture restraining orders:

This reading seriously misapprehends the nature of the provisions in question. As we have said, § 853(a) is categorical.... Under § 853(e)(1), the trial court “may” enter a restraining order if the United States requests it, but not otherwise, and it is not required to enter such an order if a bond or some other means to “preserve the availability of property described in subsection (a) of this section for forfeiture” is employed. Thus, § 853(e)(1)(A) is plainly aimed at implementing the commands of § 853(a) and cannot sensibly be construed to give the district court discretion to permit the dissipation of the very property that § 853(a) requires be forfeited upon conviction.

...Whatever discretion Congress gave the district courts in §§ 853(e) and 853(c), that discretion must be cabined by the purposes for which Congress created it: “to preserve the availability of property...for forfeiture.” We cannot believe that Congress intended to permit the effectiveness of the powerful “relation-back” provision of § 853(c), and the comprehensive “any property...any proceeds” language of § 853(a), to be nullified by any other construction of the statute.

This result may seem harsh, but we have little doubt that it is the one that the statute mandates. Section 853(c) states that “[a]ll right, title, and interest in [forfeitable] property...vests in the United States upon the commission of the act giving rise to forfeiture.” Permitting a defendant to use assets for his private purposes that, under this provision, will become the property of the United States if a conviction occurs cannot be sanctioned.

Monsanto, 491 U.S. at 612-13.

Most circuits deciding the issue have concluded that such post-indictment restraining orders may be entered *ex parte*, with no pre-restraint hearing. *United States v. Jones*, 160 F.3d 641, 647-49 (10th Cir. 1998) (pre-trial restraints may be imposed *ex parte*); *United States v. Jenkins*, 974 F.2d 32, 35-36 (5th Cir. 1992) (no due process violation where post-indictment restraining order was entered *ex parte*); *United States v. Monsanto*, 924 F.2d 1186, 1192-93 (2d Cir. 1991) (unanimous en banc court on remand from Supreme Court) (strong Government interests and exigent circumstances in forfeiture context justify imposition of pre-trial restraints without pre-restraint hearing); *United States v. Bissell*, 866 F.2d 1343, 1352 (11th Cir. 1989) (no right to pre-restraint hearing, citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974) [upholding *ex parte* seizure of personal property]); *United States v. Moya Gomez*, 860 F.2d 706, 727-28 (7th Cir. 1989) (quoting legislative history to effect that post-indictment restraining order does not require prior notice or opportunity for hearing); *id.* at 730 (holding statutory scheme unconstitutional only to limited extent that it does not provide for *post-restraint* hearing before trial); *United States v. Spilotro*, 680 F.2d 612, 617 (9th Cir. 1982) (forfeiture under exigent circumstances creates exception to pre-deprivation hearing rule, citing *Calero-Toledo*); *but see United States v. Melrose East Subdivision*, 357 F.3d 493, 499 n.3 (5th Cir. 2004) (leaving question of pre-restraint hearing in criminal cases open, but noting authority that due process does not require pre-restraint hearing for post-indictment restraining orders); *United States v. Kirschenbaum*, 156 F.3d 784, 793-94 (7th Cir. 1998) (suggesting in dicta that issue whether due process requires pre-restraint hearing is “difficult” and “close,” but not reaching issue); *United States v. Riley*, 78 F.3d 367, 370 (8th Cir. 1996) (declaring pre-conviction restraints “extreme” measures that may only be imposed where Government demonstrates “at a

hearing” that defendant is likely guilty and property to be restrained will be subject to forfeiture upon conviction). *Cf. United States v. Hernandez-Escarsega*, 886 F.2d 1560 (9th Cir. 1989) (in deciding whether probable cause supported issuance of search warrant, magistrate judge entitled to consider that grand jury recently returned an indictment against the subjects of the search).

Second, the grand jury’s finding of a probable nexus between the property and the offense may be accorded deference in subsequent proceedings where probable cause is at issue, including challenges to pre-trial restraint of assets allegedly needed to pay a defendant’s attorneys’ fees. One circuit views the grand jury’s finding of probable cause as sufficient to satisfy the Government’s burden to uphold restraints under section 853(e)(1)(A) until trial. *See United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001) (citing *In re Assets of Billman*, 915 F.2d 916, 919 (4th Cir. 1990)). Although “the indictment itself establishes the merits of the government’s case” for purposes of post-indictment restraints, other circuits recognize that in extreme situations, due process may require inquiry even into matters decided by the grand jury. *United States v. Real Property in Waterboro*, 64 F.3d 752, 755-56 (1st Cir. 1995); *see United States v. Monsanto*, 924 F.2d at 1191 (due process requires post-restraint hearing where assets needed for attorneys’ fees are involved).

The recent trend in the law is to continue post-indictment restraints based upon the grand jury’s finding of probable cause unless and until the defendant establishes both (1) an actual need for the restrained assets for, among other important purposes, attorneys’ fees or living expenses, and (2) that there is some substantial evidence that the assets are not forfeitable. *See United States v. Jones*, 160 F.3d 641, 647-48 (10th Cir. 1998) (defendant challenging pre-trial restraint of assets alleged to be forfeitable has initial burden of showing that she has no funds other than the restrained assets to hire private counsel or to pay living expenses, and that there is bona fide reason to believe restraining order should not have been entered); *United States v. Farmer*, 274 F.3d 800, 804-05 (4th Cir. 2001) (defendant entitled to pre-trial hearing if property is seized for civil forfeiture and defendant demonstrates no other assets are available; following *Jones*).

Third, the grand jury’s finding of probable cause is arguably sufficient to trigger the bar on intervention by third parties set forth in section 853(k)(2). Section 853(k)(2) prevents persons claiming interest in allegedly forfeitable property from

commenc[ing] an action at law or equity against the United States concerning the validity of his alleged interest in the property *subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture* under this section.

21 U.S.C. § 853(k)(2) (emphasis added).

That the indictment alleges that property is subject to forfeiture indicates that the grand jury has made a probable cause determination. If the indictment only gives notice of forfeiture rather than alleging that particular property is forfeitable, and no explicit probable cause finding is included in the notice, then arguably the filing of the indictment would not bar collateral litigation over the property.

Fourth, that the grand jury has found probable cause to believe certain property is forfeitable, or to believe the defendant is liable for a certain forfeiture money judgment amount, increases the impact of the actual notice of forfeitability received by a hypothetical reasonable attorney or third party upon learning of the indictment. Such notice affects the ability of any such persons to continue to receive or retain forfeitable property of the defendant as “bona fide purchasers...reasonably without cause to believe that the property [is] subject to forfeiture.” *See* sections 853(c) and (n)(6)(B); *United States v.*

McCorkle, 321 F.3d 1292, 1295 n.4 (11th Cir. 2003) (attorney may lose bona fide purchaser status as to advance fee received from client “because the client is indicted and the attorney learns additional information about his client’s guilt”); *see also Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 633 n.10 (1989) (“the only way a lawyer could be a beneficiary of section 853(n)(6)(B)[’s bona fide purchaser provision] would be to fail to read the indictment of his client”).

Fifth, the grand jury’s probable cause finding may help insulate case agents and prosecutors from subsequent liability under *Bivens*²⁷ or the Hyde Amendment.²⁸ The grand jury’s probable cause determination is at least some evidence tending to negate any inference that an action was commenced without probable cause. *See, e.g., Robinson v. Cattaraugus County*, 147 F.3d 153, 163 (2d Cir. 1998) (in malicious prosecution action under 42 U.S.C. § 1983, district court did not err in instructing that grand jury’s probable cause determination was evidence that trial jury could consider in deciding whether prosecution was commenced without probable cause).

Finally, the practice of presenting forfeiture evidence to the grand jury, listing particular forfeitable assets in the indictment, and requesting that the grand jury find probable cause for forfeiture of those assets should help to defend indictments against future challenge if *Blakely* is ultimately construed or extended to apply to criminal forfeiture and to require that the facts supporting forfeiture of particular assets be charged in the indictment and proven to the trial jury beyond a reasonable doubt.

For all of these reasons, prosecutors should ask the grand jury to find probable cause to believe that the requisite nexus exists between the crimes charged and any particular property or money judgment amount alleged to be forfeitable.

B.4 It is not necessary to ask the grand jury to determine the defendant’s interest in forfeitable property

A separate issue is whether the prosecutor should also ask the grand jury to find probable cause to believe that “the defendant (or some combination of defendants [charged] in the case) had an interest in the property that is forfeitable under the applicable statute.” *See* Fed. R. Crim. P. 32.2(c)(2). Unlike the forfeiture nexus, this issue is not even presented to the *trial* jury. Indeed, the court itself only reaches the issue of the defendant’s interest in forfeitable property in cases where no ancillary claims to the property are filed. Moreover, unlike the nexus finding, which serves the various useful purposes outlined above, a finding of probable cause to believe that the defendant has an interest in particular property serves no comparable purpose in most cases. Therefore, it does not make sense to present this issue to the grand jury.

Nonetheless, in cases where the defendant has attempted to conceal an interest in property subject to forfeiture, it may be important to the grand jury’s understanding of the case—and its ability to make necessary findings as to elements of charged offenses—to present evidence concerning the defendant’s actual, although hidden, interest in forfeitable property. For example, in a case where the defendant acquires or transfers property in such a way as to “conceal or disguise the nature, the location, the source, the ownership, or the control” of criminal proceeds in violation of 18 U.S.C. § 1956(a)(1)(B)(i), the prosecutor may be required to present evidence to the grand jury tending to show that the defendant in fact had ownership or control of the property involved in such a transaction.

²⁷ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

²⁸ Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (reprinted in 18 U.S.C. § 3006A, historical and statutory notes).

In any event, because only property of the defendant can be forfeited in a criminal case, the prosecutor should make reasonable efforts to establish that any property alleged to be forfeitable, and particularly property sought to be restrained as forfeitable, is property of the defendants within the meaning of the applicable forfeiture statutes, including section 853(c), which voids purported post-crime transfers of forfeitable property other than to bona fide purchasers for value reasonably without cause to believe the property was subject to forfeiture.

B.5 Presenting forfeiture evidence to the grand jury

Just as most trial evidence relating to forfeiture is usually best, and most easily, presented as an integral part of the overall presentation of the Government's case-in-chief, most grand jury evidence bearing on forfeiture is best, and most easily, presented as an integral part of the evidence establishing probable cause to charge the underlying criminal offenses. Questions about assets and their links to criminal activity should be asked of all witnesses likely to have such knowledge, during both lengthy grand jury investigations and the more abbreviated presentations appropriate to cases investigated primarily outside of the grand jury.

When this practice is followed, a case agent or other government witness can be brought in shortly before an indictment is returned to summarize previous testimony and documentary evidence bearing on forfeiture. In addition to reminding the grand jury of such previously presented evidence, the summary witness should be prepared to present any additional documents and information necessary to calculate the amount of any proposed forfeiture money judgment and identify and describe any particular assets to be alleged as forfeitable in the proposed indictment. It is usually best to have previously marked asset-related documents—such as certified copies of public real estate, business, and vehicle registration and title records, authentic photographs of major assets, and stipulated or authenticated bank and other financial account statements—available for examination by the grand jury during its consideration of the proposed indictment, including the forfeiture allegations.

Even if forfeiture has not been an ongoing focus of the investigation, the evidence necessary to establish the required link between the charged offenses and the particular forfeitable assets to be listed in the indictment can usually be presented by a government agent witness in a simple and straightforward manner, not requiring much grand jury time. The focus in such a presentation, as in the summary presentation described above, should be upon (1) the facts that identify the assets with particularity, and (2) the facts that make the assets forfeitable under all applicable theories of forfeiture—e.g., facts indicating that the assets “constitute, or were derived from, proceeds” of the offenses; that the assets were “used, or intended to be used, in any manner or part, to commit, or to facilitate the commission” of the offenses; that the assets constitute “property, real or personal, involved in” the offenses or “property traceable to such property,” etc. *See*, e.g., section 853(a) and 18 U.S.C. § 982(a)(1).

B.6 Instructing the grand jury on forfeiture

If it is consistent with local practice to do so, the prosecutor may explain to the grand jury preliminarily that (1) forfeiture is not a substantive offense, or an element of an offense, but rather a required part of the punishment imposed upon conviction for certain criminal offenses; (2) the forfeiture allegations in the proposed indictment will put the defendant on notice that the Government is seeking to forfeit certain property, or types of property, upon the defendant's conviction; and (3) the

Government will seek to forfeit substitute assets of the defendant if some act or omission of the defendant makes the directly forfeitable property unavailable.²⁹

The prosecutor should then instruct the grand jury with respect to the links that must be found to exist between the charged offenses and the assets alleged to be forfeitable. Generally, this may be done by reading and explaining the pertinent parts of the applicable forfeiture statutes, explaining how each listed asset falls within one or more of the forfeiture provisions, and explaining the basis for calculating or estimating the amount to be alleged as a forfeiture money judgment.

Finally, if the grand jurors have no questions about the forfeiture instructions, the prosecutor should ask the grand jury, during its process of considering the entire indictment, to find probable cause to believe that the listed assets have the required links to the charged offenses and that there is a factual basis for the alleged money judgment amount.

B.7 Memorializing and describing the grand jury's probable cause finding

As explained in section II.B.3, there are several good reasons for asking the grand jury to find probable cause for forfeiture of particular assets. If the grand jury was actually asked to make such a finding in the course of its deliberations on the indictment, prosecutors may properly represent to the court, in connection with an application for a post-indictment restraining order or otherwise, that the grand jury has found probable cause to believe that the requisite forfeiture nexus exists with respect to the money judgment amount and any other property listed in the indictment as forfeitable.

To make the grand jury's probable cause finding readily accessible for seeking and defending pre-trial restraints and the other purposes described in section II.B.3, it is a good practice to memorialize the finding in the indictment itself. There are several ways to accomplish this.

The grand jury finding as to forfeitability may be set forth in the indictment in a way that simply parallels the presentation of the other substantive charges and allegations in the indictment as to which the grand jury also found probable cause. Practices vary from district to district with respect to whether phrases like "The grand jury charges" appear only at the beginning of the indictment or repeatedly, e.g., "The grand jury further charges", at the beginning of each count. In either case, introducing the forfeiture allegations in the same way as the substantive counts makes it reasonably plain on the face of the indictment that the grand jury has made a probable cause determination with respect to the entire indictment, including the forfeiture allegations.

In a district where there is frequent litigation over pre-trial restraints, the prosecutor may wish to give special emphasis to the grand jury's finding of probable cause for forfeiture of particular assets by making that finding explicit in the text of the indictment: "The grand jury further finds probable cause to believe that upon conviction of the offense[s] in violation of _____ set forth in Count[s] [##] of this Indictment/Information, the defendant[s], [NAME(S)], shall forfeit to the United States

²⁹ Some districts have found it useful to cover these points in an introductory presentation to the grand jury outlining forfeiture law and procedures, as part of the grand jury's orientation during the first few weeks after a new grand jury is empaneled. This can be done by the district's forfeiture AUSA, who is in the best position to cover these issues and to address the grand jurors' questions. The orientation session also provides the prosecutor with the opportunity to explain to the grand jury that forfeiting the defendant's interest in a piece of property does not end the matter, but that an ancillary proceeding is held after a preliminary order of forfeiture is entered to allow third parties who claim to have an interest in the property to petition the court to establish that interest. While that issue is of no direct concern to the grand jurors in their deliberations, it is helpful that they understand that the Government is not seeking to forfeit the property of owners with superior interests to that of the defendant or property belonging to innocent bona fide purchasers of the property.

of America, pursuant to ____ U.S.C. ____, all [insert statutory language], including, without limitation, \$_____ in United States currency and the following other particular assets: ____.” If this approach is used, it should be used consistently to avoid any negative implication that a grand jury returning an indictment with no such explicit finding did *not* find probable cause for forfeiture.

In districts that use the convention of merely giving notice of forfeiture in indictments rather than alleging forfeiture in forfeiture allegations or charging forfeiture in a forfeiture count, it is best practice to include an explicit probable cause finding of forfeitability in the notice section. Doing so will counter any possible implication or argument that the forfeiture notice was merely appended to the indictment without grand jury consideration and determination of probable cause.

Chapter 9: International Forfeiture

I. Forfeiture of Assets Located Abroad Under United States Law

Federal law enforcement should include in its priorities the pursuit of forfeitable assets beyond the borders of the United States. Federal investigators and prosecutors who seek to restrain and forfeit illicit assets located abroad should seek the advice of the Asset Forfeiture and Money Laundering Section (AFMLS). It is advisable that this contact be made as soon as foreign assets are identified as potentially subject to forfeiture under U.S. law. The extent and speed of forfeiture assistance afforded by the foreign nation in which the assets are located may vary greatly depending upon the applicable treaty obligations and laws of the foreign nation. Moreover, international requests for legal assistance occasionally may implicate issues of diplomatic sensitivity and/or require coordination with other related investigations, domestic or foreign. AFMLS will help guide Assistant U.S. Attorneys (AUSAs) and agents through this often complicated process.

II. Importance of Reciprocal Cooperation: Forfeiture of Assets Located in the United States under Foreign Law

The Department of Justice (DOJ) assigns high priority to requests by foreign countries for assistance in restraining, forfeiting, and repatriating assets found in the United States that are forfeitable under foreign law. We should not expect cooperation from foreign governments in our efforts to forfeit and repatriate assets found abroad under U.S. law unless we reciprocate as to foreign requests in a timely and effective manner. Additionally, it is important for the United States affirmatively to act on such incoming requests so that it is not wrongly perceived as becoming a safe haven for proceeds of foreign crime and other property forfeitable under foreign law. AFMLS can offer advice and assistance regarding the execution of incoming forfeiture requests and, in consultation with the Office of International Affairs (OIA), will attempt to direct incoming foreign requests for forfeiture assistance to the established forfeiture contact(s) within each district.

III. Policy on International Contacts

DOJ, by long-standing policy, has required that all incoming and outgoing international contacts by or with AUSAs regarding criminal justice matters be coordinated with and through OIA. OIA is the designated entity through which the United States must make all formal requests for legal assistance to foreign governments. Federal prosecutors must adhere to established procedures for international contacts and should not contact foreign officials directly on case-related matters unless such contacts have been approved by, are under the supervision of, or are in consultation with OIA. Often, OIA will permit prosecutors to have direct contact with foreign officials provided OIA is copied on, or informed about, all of the relevant communications. Federal investigators and prosecutors should consult with OIA regarding the official policy on contact with foreign officials.

IV. Foreign Property Management Issues

Tangible assets located abroad may present unique property management issues. Federal prosecutors and investigators should keep in mind that, although many countries are willing to restrain or seize assets in support of U.S. forfeiture efforts, some of them lack the resources, experience, or legal authority that allow for adequate management of the seized or restrained property pending resolution

of the U.S. forfeiture proceeding. Thus, extensive pre-seizure or pre-restraint planning may be required as to certain property located abroad, which is likely to require affirmative post-seizure or post-restraint preservation or management. Foreign governments may be willing to assume responsibility of preserving assets, or they may ask the United States to do so, and the United States or the foreign government may need to hire, or legally appoint, guardians, monitors, trustees, or managers for certain assets. Prosecutors should be aware that the costs of storing, maintaining, and disposing of certain assets, particularly depreciating assets such as vehicles, vessels, or aircraft, located in a foreign country may, in protracted international forfeiture cases, exceed the value of the asset itself.

When faced with the seizure of tangible assets abroad that may require affirmative management, a federal prosecutor or investigator should promptly contact the U.S. Marshals Service (USMS). In cases in which the lead law enforcement agency is a Department of the Treasury or Department of Homeland Security agency, the federal prosecutor or investigator should contact the Department of the Treasury, Executive Office of for Asset Forfeiture (TEOAF) at 202-622-9600. AFMLS must be consulted before the United States asks a foreign government to restrain or seize an ongoing business or its assets or to appoint or hire a guardian, monitor, trustee, or manager for same.

Finally, in order to accurately track assets restrained abroad, it is important to create a “Frozen, Indicted, Restrained, Encumbered (FIRE) asset” entry in CATS prior to requesting restraint of assets abroad. In cases in which the lead law enforcement agency is a Department of the Treasury or Department of Homeland Security agency and the asset is tracked in AFTRACK, the federal prosecutor or investigator should nonetheless ensure that a parallel FIRE asset entry is created in CATS.

V. Publication of Notice Abroad

In both civil and criminal forfeiture proceedings, the United States is required to provide notice by publication which may occur on the Government forfeiture website, www.forfeiture.gov.¹ Publication on the Internet provides more effective (and cost-efficient) notice than newspaper publications because the notice is available 24 hours a day, is reachable throughout the globe by anyone with Internet access, and is searchable by the user by use of search terms. Therefore, in the absence of a compelling reason to use print publication, publication on the Internet should be considered the norm and print publication the exception.

Depending on the facts of the case, however, it may be appropriate to publish notice in a newspaper of general circulation in the country in which the assets are restrained or seized and/or via legal notices, in the appropriate foreign language, in the country in which known potential claimants are located. Publication abroad should be requested in the same manner and format that complies with the requirements of domestic publication in the United States and, as much as is possible, in the manner requested by the foreign government providing assistance with the publication. Some foreign governments will assist with publication, while other governments require the United States to make its own arrangements. In many instances, reliance may be placed on United States law enforcement attachés stationed in foreign countries to arrange for publication. Some foreign governments will not assist the United States with publication but still require that we obtain governmental permission before we publish in their jurisdictions. Other countries insist that there be no publication at all within their borders. Where foreign publication does occur, the United States typically pays the costs of publication. AFMLS should be consulted to ascertain the foreign government’s preferences regarding publication of notice within its borders before attempting publication in the country.

¹ See Federal Rules of Civil Procedure Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, Rule G(4) and Federal Rules of Criminal Procedure Rule 32.2(b)(6).

Publication on www.forfeiture.gov is limited to English at this time. AFMLS has requested that the software be changed to allow publication in other languages as well.

VI. Consultation with AFMLS or OIA When Seeking Repatriation of Forfeitable Assets Located Abroad

In cases where a foreign government has restrained or seized assets based upon the formal request of the United States, the prosecutor and investigators should consult AFMLS, or the OIA attorney handling the case, before seeking repatriation of restrained or seized assets. AFMLS, in consultation with OIA, is usually aware of foreign legal constraints on repatriation of forfeitable assets, as well as any sensitivity against repatriation on the part of the foreign government, and, therefore, must be consulted before taking any action to repatriate such frozen assets. Repatriation of frozen assets also generally requires that any foreign restraint or seizure order be lifted or modified, as needed, which can only be done with the consent of and action by the appropriate foreign country. In some cases, resolution of the U.S. forfeiture action may not alone be sufficient cause for lifting the foreign restraint; for example, the seizure or restraint may remain in place pending the outcome of a related prosecution in jurisdictions having mandatory prosecution laws. *See* discussion in section XI.

Further, federal prosecutors and investigators, before seeking an order compelling the repatriation of specific assets pursuant to 21 U.S.C. § 853(e)(4), should always consult with AFMLS or OIA before negotiating or ratifying an agreement with a defendant to repatriate criminally derived assets from abroad, even as to property that is not seized or restrained by the foreign government. Such consultation is advisable because, for one thing, the property in question may be subject to domestic proceedings in the foreign jurisdiction. For another, certain countries deem another government's efforts to repatriate assets located in their jurisdictions to constitute a violation of that their sovereignty, and in rare instances, such nations may deem any person who instigates or is involved in the effort to repatriate to be involved in committing a criminal offense, such as money laundering. Similarly, many countries may not object to a negotiated voluntary repatriation of assets and allow such transfers to occur pursuant to a plea agreement or settlement, but often object to court-ordered, non-voluntary repatriations because they regard the repatriation order as a "coercive measure" that violates the property owner's civil rights under their domestic law. Other countries take the position that a failure to inform them of forfeitable assets located in their jurisdiction is a violation of applicable treaty obligations. Finally, in matters in which the United States previously has asked a foreign government to restrain an asset, a voluntary repatriation by the defendant will obviously require the lifting or modification of the foreign restraint of seizure, which, although legally permissible, may subject the foreign nation to unintended legal liabilities under its law, such as attorneys' fees.

VII. Probable Cause Finding to Seize or Restrain Assets Abroad

In *Kim v. Department of Justice*,² a federal district court held that the United States must demonstrate probable cause of forfeitability of the subject assets before requesting another country to seize or restrain the assets. As a result, AFMLS and OIA, in the exercise of caution and solely as a matter of policy, and without conceding that *Kim* is properly decided, advise prosecutors seeking the seizure or restraint of property located abroad to first obtain a probable cause finding from a U.S. court

² No. CV 05-3155 ABC (FMOx) (C.D. Cal. July 11, 2005) (unpublished). *See also Collelo v. Securities and Exchange Commission*, 908 F. Supp. 738 (C.D. Cal. 1995), on which the *Kim* court heavily relied.

regarding the forfeitability of the property in question before asking OIA to make the request.³ As discussed below, there are a number of ways to obtain such a probable cause finding.⁴ Again, nothing in this section is intended to suggest or concede that such a probable cause finding is necessary, and the discussion reflects only a matter of policy.

A. Criminal cases

In a criminal forfeiture case, there are at least three options for obtaining a probable cause determination regarding forfeitability: (1) naming the foreign-based asset in the forfeiture allegation in the indictment and requesting the grand jury to find probable cause for forfeiture; (2) obtaining a restraining order; and (3) obtaining a criminal seizure warrant.

A.1 Indictment

If a pending indictment contains a criminal forfeiture allegation relating to property located abroad, and the grand jury has made a finding of probable cause to believe that the *specific property* located abroad is subject to forfeiture, the indictment itself will serve as the necessary probable cause finding for purposes of the mutual legal assistance treaty (MLAT) request.⁵

A.2 Restraining order

Once the indictment is returned, the Government may obtain a post-indictment *ex parte* restraining order pursuant to 21 U.S.C. § 853(e). Such a restraining order requires a finding of probable cause; therefore, the issuance of the restraining order will provide the necessary probable cause determination so long as the asset located abroad is specifically identified in the restraining order.

The restraining order may be obtained in either of two ways. First, if the property is specifically listed in the indictment and the grand jury actually finds probable cause for the forfeiture allegation, most courts hold that the grand jury's finding of probable cause is alone sufficient to support the issuance of a restraining order without further submission by the Government.⁶ However, it should not be necessary to obtain such an order solely for purposes of complying with "the *Kim* policy" where the property located in the foreign nation is listed in the indictment and the grand jury specifically found probable cause for forfeiture of the property. Moreover, property that was not specifically listed in the forfeiture allegation of the indictment but is later identified as subject to forfeiture in a bill of particulars, will meet the requirements of "the *Kim* policy" if the Government supports its application for modification of the restraining order to include the overseas property with a probable cause affidavit regarding the property.

³ Under rare circumstances, OIA may authorize a prosecutor to move forward with a treaty request to seize or restrain assets abroad without the prosecutor first obtaining a finding of probable cause.

⁴ OIA will consider making a formal request without a probable cause determination where the assets located in a foreign state are held by a person "with no voluntary attachment to the United States," rendering the Fourth Amendment inapplicable. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). If the facts support this conclusion, the prosecutor should discuss this possibility with OIA.

⁵ A general or "generic" description of assets, such as "all property of the defendant located in Switzerland" will probably not satisfy the particularity requirement for probable cause under the Fourth Amendment.

⁶ See *United States v. Jamieson*, 427 F.3d 394, 405 (6th Cir. 2005) (initial issuance of restraining order may be based on grand jury's finding of probable cause); *United States v. Bollin*, 264 F.3d 391, 421 (4th Cir. 2001) (the grand jury's finding of probable cause is sufficient to satisfy the Government's burden).

A.3 Criminal seizure warrant

The legal authority for the issuance of a criminal seizure warrant against foreign-based property is not explicit. Section 853(f) authorizes an AUSA to obtain a seizure warrant from the court in the same manner as a search warrant under Rule 41, and section 853(l) provides that a federal court has “jurisdiction to enter orders as provided in this section *without regard to the location of any property which may be subject to forfeiture*” (emphasis added). However, section 853(f), which governs issuance of criminal seizure warrants, is not as broad as the corresponding authority for civil seizure warrants under section 981(b). It provides that criminal seizure warrants may be obtained only if it appears that a restraining order would be inadequate to preserve the availability of the property for forfeiture. The outcome of a foreign nation’s deliberative process on applying for a preventive measure to secure the property under foreign law seldom turns on whether the United States obtained a seizure warrant or restraining order as a means of establishing probable cause for forfeiture. Thus, the Government, for the most part, will be unable to assert a strong argument to a U.S. court that a Rule 41 seizure warrant is required because a restraining order pursuant to section 853(e) would not be sufficient for preservation of the property subject to forfeiture; this is because foreign governments rarely, if ever, execute the warrant or restraining order issued by a U.S. court but instead obtain and enforce orders under foreign law, using the U.S. order as evidence to establish probable cause. Refraining from use of criminal seizure warrants also avoids the issue of whether a U.S. district court has the authority to issue an extraterritorial seizure warrant pursuant to Fed. R. Crim. P. 41(b). Rule 41(b)(3) permits a federal court to issue warrants for foreign-based property only in domestic and international terrorism investigations and not for any other types of investigations. Section 981(b) expressly overrides the conflicting language in Rule 41(b), whereas section 853(l) does not. For purposes of satisfying “the *Kim* policy” in criminal cases, therefore, it seems advisable to obtain a restraining order rather than risk litigating the scope of Rule 41(b) or attempting to make the higher showing required to obtain a seizure warrant under section 853(f).

B. Civil forfeiture cases

In a civil forfeiture case, there are at least three options for obtaining a probable cause determination: a warrant of arrest in rem, a seizure warrant, and a restraining order.

B.1 Warrant of arrest in rem

The preferred means of obtaining the requisite probable cause finding is to obtain a warrant of arrest in rem from the district court after a civil forfeiture complaint has been filed. Supplemental Rule G(3)(b)(ii) and (c)(iv) require a probable cause finding by a judge or magistrate judge before any warrant of arrest in rem is issued for property that is not already in the custody of the Government and provide for sending the warrant to a foreign country if the property is located abroad. Obtaining a warrant of arrest in rem under Rule G is the best and easiest means of obtaining the required probable cause finding in support of MLAT requests asking another country to seize or restrain property abroad.

B.2 Civil seizure warrant

Another option is to obtain a civil seizure warrant for the property pursuant to 18 U.S.C. § 981(b)(2) in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure. Such a warrant requires a finding of probable cause and may be obtained on an *ex parte* basis. Section 981(b) applies to all property subject to civil forfeiture under both section 981(a) (the forfeiture statute

applicable to most federal crimes), and any other forfeiture statute containing language incorporating the procedures of Chapter 46 of Title 18 of the U.S. Code, such as 21 U.S.C. § 881(a) (the civil forfeiture statute for drug offenses) and/or 8 U.S.C. § 1324(b) (the civil forfeiture statute for the smuggling or harboring of illegal aliens).⁷ Accordingly, section 981(b) provides a means for obtaining a probable cause finding under the vast majority of federal civil forfeiture statutes; however, where a given civil forfeiture statute does not incorporate section 981(b), the prosecutor will have to identify an alternative statutory basis for obtaining a pre-complaint finding of probable cause of forfeitability as to the foreign property sought to be forfeited. AFMLS can assist in this endeavor before seeking an order actually compelling the repatriation of specific assets pursuant to 21 U.S.C. § 853(e)(4).

In seeking such a warrant, it may be helpful to explain to the magistrate or judge the statutory scheme authorizing federal courts to order the seizure of assets in a foreign country. A court has the authority to issue seizure warrants for assets located in a foreign jurisdiction pursuant to 18 U.S.C. § 981(b)(3). Section 981(b)(3) provides that a seizure warrant may be issued by a “judicial officer in any district in which a forfeiture action against the property may be filed under [28 U.S.C. § 1355(b)], and may be executed in any district in which the property is found, *or transmitted to the central authority of any foreign state for service in accordance with any treaty or other international agreement.*” 18 U.S.C. § 981(b)(3)(emphasis added). Pursuant to 28 U.S.C. § 1355(b), a forfeiture action may be brought in any district court where any of the acts giving rise to the forfeiture occurred, even as to property located in a foreign jurisdiction.

One concern about obtaining such a seizure warrant is that section 981(b) arguably incorporates all the provisions of Federal Rules of Criminal Procedure 41, which, in turn, might require that the warrant be executed within 14 days. However, section 981(b)(3) states that notwithstanding the provisions of Rule 41(a)⁸ a seizure warrant may be “transmitted to the central authority of any foreign state for service in accordance with any treaty or other international agreement.” Thus, once a seizure warrant is obtained under section 981(b) and a formal request is made to the foreign country through OIA to execute that warrant, the requirements of both section 981(b)(3) and Fed. R. Crim. P. 41 are completely satisfied once the warrant has been transmitted for service. Prosecutors attempting to obtain such a seizure warrant are encouraged to first consult with AFMLS.

B.3 Restraining order

Finally, whether or not a complaint has been filed, the Government may ask the court to issue a restraining order pursuant to 18 U.S.C. § 983(j). A restraining order may be issued on an ex parte basis. Restraining orders may only be issued upon a showing of probable cause—usually in the form of an affidavit submitted along with the application for the order.⁹ Thus, the issuance of a restraining order will constitute the probable cause finding required to support the MLAT request.

⁷ See also 18 U.S.C. § 1594 (forfeiture provisions for human trafficking).

⁸ Prior to the 2002 Amendments to the Fed. R. Crim. P. 41, section (a) addressed the jurisdictional reach of Rule 41 search warrant, which, arguably, was limited to locations within the United States. The Rule 41 reference in section 981(b), added by the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 114 Stat. 202 (2000), was express Congressional intent to give U.S. courts jurisdiction to issue seizure warrants with an extra-territorial reach. After 2002, Rule 41(a) contains scope and definitions provisions not relevant for jurisdictional reach and, hence, the section 981 reference to Rule 41 is confusing.

⁹ See *United States v. Melrose East Subdivision*, 357 F.3d 493 (5th Cir. 2004) (applying the probable cause requirement in *United States v. Monsanto*, 491 U.S. 600 (1989), to section 983(j)(1)(A)).

C. Parallel civil and criminal cases

Perhaps the best option of all is simply to initiate both civil and criminal forfeiture actions against property located abroad and then stay the civil proceeding pursuant to 18 U.S.C. § 981(g)(1) until the conclusion of the parallel criminal proceedings. In addition to allowing you a choice of options for restraining assets abroad, you will also have preserved your options should the criminal forfeiture fail for any reason.

VIII. Consultation for Civil Forfeiture of Property Located Overseas

Many countries cannot enforce civil forfeiture orders or judgments or are very uncertain that enforcing same under their laws is legally sound. Thus, if possible, prosecutors should first pursue the criminal forfeiture of assets located abroad. Prosecutors should attempt the civil forfeiture of assets located abroad only when obtaining a criminal forfeiture judgment against those assets does not appear to be, or no longer appears to be, a viable option. According to section 9-13.526 of the U.S. Attorney's Manual (USAM), AUSAs shall consult with OIA before filing an in rem forfeiture action based on 28 U.S.C. § 1355(b)(2). OIA and AFMLS will then determine whether the foreign country where the assets are located can assist in the U.S. civil forfeiture action.

IX. Approval Process for Section 981(k) Seizure from Correspondent Bank Account

Section 981(k) authorizes the United States, in a civil forfeiture action, to “constructively” restrain, seize, and forfeit funds on deposit in foreign bank accounts located by restraining, seizing, and forfeiting an equivalent amount of funds from a correspondent/interbank account held in the United States by the foreign financial institution with which the aforementioned foreign bank account is maintained. *See* 18 U.S.C. § 981(k). It is irrelevant for purposes of section 981(k) whether the tainted funds on deposit in the foreign bank account ever transited through the foreign bank's U.S. correspondent account that is subject to the section 981(k) forfeiture effort. Thus, section 981(k) can be used to “constructively” restrain, seize, and forfeit funds on deposit abroad without resort to a treaty or letter rogatory request. Even so, use of this provision must be formally approved by AFMLS and approval will be granted only in extraordinary cases in which the government of the nation in which the foreign account is located is unable or unwilling to provide assistance regarding U.S. efforts to forfeit funds directly from the foreign account.

Approval authority for use of section 981(k) rests with the Chief of AFMLS in consultation with the appropriate officials of OIA, the Department of the Treasury, and the Department of State. These officials should be viewed as “stakeholders” in the serious policy implications raised by the potential use of section 981(k) and need an opportunity to closely review the section 981(k) request and consider the ramifications of granting the request. Thus, formal approval to use section 981(k) should be sought well in advance of any attempt to restrain or seize assets from a foreign bank's correspondent accounts in the United States. Applications requesting approval to use section 981(k) should be submitted in writing to the chief of AFMLS, who has responsibility for coordinating the approval process. Sample section 981(k) approval requests may be obtained from AFMLS. Prosecutors should be mindful that requests for authority to use section 981(k) as the basis for “constructively” forfeiting funds on deposit in foreign accounts will be approved only if there are no other viable alternative means of effecting forfeiture of the tainted funds in the foreign bank account. It, therefore, should be considered only as a last resort. An application will not be approved simply because it is deemed more expedient than utilizing the treaty or letters rogatory mechanism.

Section 981(k) requests will be approved only in limited cases, such as when:

- (1) There is no applicable treaty, agreement, or legal process in the foreign nation that would allow it to restrain, seize, or forfeit the target assets for the United States;
- (2) There is a treaty or agreement in force, but the foreign nation does not recognize the U.S. offense that gives rise to forfeiture;
- (3) There is a treaty or agreement in force, and in spite of its treaty obligation, in the past the foreign nation has failed to provide requested forfeiture assistance, or provided untimely or unsatisfactory forfeiture assistance;
- (4) There is a treaty or agreement in force, but the foreign nation has no domestic legislation authorizing it fully to execute U.S. forfeiture orders or judgments; or
- (5) There is some other significant reason that, in the view of the policy stakeholders, justifies use of section 981(k) (e.g., corruption within the foreign government that may compromise the execution of a treaty request, or the inability to repatriate or return victim money to the United States after forfeiture).

Prosecutors should take special care, once permission is granted to seize funds from a U.S. correspondent account pursuant to § 981(k), to ensure that only the amount of tainted funds traceable to, and on deposit in, the foreign bank account are seized from the correspondent account.

X. Lack of Administrative Forfeiture Authority for Overseas Property

Forfeiture of assets located abroad must be initiated as part of a pending judicial forfeiture action, civil or criminal. There is no authority under federal law to commence an administrative forfeiture of property that is not physically located in the United States or its territories or possessions. Administrative forfeiture can, of course, be pursued against property repatriated to the United States pursuant to section VI, assuming the property is otherwise eligible for administrative forfeiture.

XI. Settlements, Plea Agreements, and Attorneys' Fees

Federal prosecutors should not agree to, or enter into, any settlement or plea agreement affecting assets located abroad, or make any representation concerning the availability of assets located abroad to pay the legal fees incurred by a criminal defendant without first speaking to AFMLS about the foreign consequences of such decisions. *See* USAM 9-111.700. In addition, prosecutors should be aware of limitations on negotiating with fugitives or persons fighting extradition. The policy considerations that underlie the consultation and approval requirements applicable to settlement and plea agreements and agreements to use forfeitable funds to pay for attorneys' fees in purely domestic cases apply with even greater force in the international context, particularly in light of the problems inherent in releasing property held abroad. *See* section VII. In some cases, a U.S. request to restrain or seize foreign assets will necessarily precipitate the initiation of a foreign criminal investigation, as many jurisdictions are required to prosecute all criminal matters brought to their attention. Thus, it may not be possible to make any meaningful or binding commitments to defendants or claimants regarding the disposition of funds restrained or seized abroad because the property may remain restrained or seized, or even ordered forfeited, under foreign law following conclusion of the U.S. forfeiture proceeding. Furthermore, the United States has no authority to bind a foreign government regarding the disposition of assets ordered forfeited in any U.S. proceedings. In addition, all plea and settlement agreements

should include broad waiver and indemnification language that protects both U.S. and foreign officials, and their governments, from any liability arising from seizing, restraining, or forfeiting assets located abroad. Finally, prosecutors should seek and, if possible, obtain the agreement of a defendant or claimant specifically to waive any right to an award of costs and/or attorneys' fees under foreign law and to not oppose any legal action in any foreign jurisdiction relating to U.S. forfeiture efforts or any U.S. request to a foreign government for related financial records.

XII. Enforcement of Judgments

A. Foreign enforcement of U.S. judgments

With increasing frequency, nations are able to afford full faith and credit to U.S. forfeiture judgments affecting property within their borders. Before transmitting a U.S. forfeiture judgment via OIA to a foreign jurisdiction to be given effect, prosecutors should verify that the judgment is final under U.S. law. In other words, the judgment must be final and no longer subject to direct appeal either because all opportunities for direct appeal have been taken and exhausted or the time for filing a direct appeal has expired. These facts should be noted in the legal assistance request to the foreign authority for the jurisdiction in which the judgment is sought to be enforced. In criminal cases, great care should be taken to obtain a final order or judgment of forfeiture. In no case should a preliminary order of forfeiture, which is only valid as to the convicted criminal defendant, be sent to a foreign authority for execution; only the completed final order of forfeiture should be submitted. This is particularly true of cases in which an asset forfeited to the United States is not titled in the name of the convicted defendant; the convicted defendant has a legal or common law spouse with a possible interest in the forfeited property; or another person conceivably could claim a valid interest in the forfeited property—and this remains true even if the convicted defendant has agreed to forfeit the asset in a plea or settlement agreement. Prosecutors should be mindful that third parties who did not appear in the U.S. proceedings may still be permitted to challenge enforcement of the U.S. forfeiture orders under foreign law. Thus, when transmitting a U.S. forfeiture judgment for execution by a foreign country, it is advisable always to demonstrate to the foreign jurisdiction that third parties were provided or sent notice of the U.S. forfeiture proceedings, had an opportunity to challenge the U.S. forfeiture, and either failed to avail themselves of the right to contest the forfeiture or were unsuccessful in their challenges.

B. U.S. enforcement of foreign judgments and restraining orders

Pursuant to 28 U.S.C. § 2467, the United States can enforce foreign forfeiture judgments. Section 2467 was amended by the *Preserving Foreign Criminal Assets for Forfeiture Act of 2010*, Pub. L. 111-342, § 2, Dec. 22, 2010, 124 Stat. 3607 in response to the ruling of the Court of Appeals for the D.C. Circuit in *In re Any and All Funds or Other Assets, in Brown Brothers Harriman & Co. Acct. #8870792 in the Name of Tiger Eye Investments, Ltd., et al.*, 613F.3d 1122, (D.C. Cir. 2010). This is a technical amendment clarifying that the United States can seek the restraint of assets in the United States at the request of the foreign jurisdiction during the pendency of the foreign proceedings. The amended statute makes clear that a final foreign forfeiture judgment is not necessary for the United States to restrain the asset. The amended statute also makes clear that the references to section 983(j) were not intended to require a literal application of the subsection in these cases and references to “civil forfeiture” and “forfeiture judgment” are only to foreign civil or criminal proceedings and foreign judgments.

XIII. International Sharing

It is the policy of the United States to encourage international asset sharing national sharing and to recognize all foreign assistance that facilitates U.S. forfeitures so far as consistent with U.S. law. International sharing is governed by 18 U.S.C. § 981(i), 21 U.S.C. § 881(e)(1)(E), and 31 U.S.C. § 9703(h)(2), and is often guided by standing international sharing agreements or may be the subject of bilateral case-specific forfeiture sharing arrangements to be negotiated by AFMLS and approved by the Department of State. The decision to share with a foreign government assets that have been forfeited to the United States is a completely discretionary function of the Attorney General or the Secretary of the Treasury, although it also requires the concurrence of the Secretary of State and, in certain circumstances, may be vetoed by Congress. A 1992 international sharing Memorandum of Understanding between the Departments of State, Justice, and Treasury expressly prohibits investigators or prosecutors from making representations to foreign officials “that assets will be transferred in a particular case, until an international agreement and commitment to transfer assets have been approved by the Secretary of State and the Attorney General or the Secretary of the Treasury.” Prosecutors and federal law enforcement agencies should always be mindful that any international sharing is given priority and any domestic sharing can occur only after all international sharing is completed. Moreover, in all cases, both international and domestic, sharing comes from the net sale proceeds of forfeited property following the deduction of all case-related. Thus, federal prosecutors and investigators should refrain from making any representations, to representatives of either a foreign government or any domestic law enforcement agency that provided assistance, regarding any sharing tied to the forfeiture of assets located abroad or any domestic forfeiture accomplished with the assistance of a foreign government.

Foreign governments are not required to follow a specific process for submitting a sharing request to the United States. This may be done so pursuant to a treaty or sharing agreement, or, less formally, through other diplomatic or law enforcement channels. Prosecutors and law enforcement agencies can and should make sharing recommendations whenever they have received foreign assistance that facilitated the forfeiture of an asset in a U.S. case, particularly as to assets located in the United States. When the United States forfeits assets in a judicial forfeiture case with the assistance of a foreign state and the seizing agency is a Department of Justice component or participant in the Department of Justice Assets Forfeiture Fund (AFF), the federal prosecutor assigned to the case is responsible for sending a formal sharing recommendation to AFMLS. For assets forfeited administratively, the seizing agency is responsible for submitting the recommendation.

In cases involving a recommendation for sharing involving the AFF, AFMLS previously prepared the sharing recommendations for approval by the Deputy Attorney General (DAG). In May 2013, the DAG delegated: (1) the authority to the Assistant Attorney General of the Criminal Division to make final determinations on uncontested international equitable sharing proposals involving assets valued at more than \$5 million, and (2) the authority to the Chief of AFMLS to make final determinations on uncontested international equitable sharing proposals involving forfeited assets valued at \$5 million or less.¹⁰ If the seizing agency, USAO, AFMLS, and the Secretary of State do not agree on the sharing allocations, the final decision must be made by the DAG.

In cases implicating the Treasury Forfeiture Fund (TFF), the seizing agency (e.g., Internal Revenue Service, U.S. Secret Service, or Immigration and Customs Enforcement) is responsible for submitting a sharing recommendation to TEOAF. However, the seizing agency should first consult

¹⁰ See Deputy Attorney General delegation dated May 27, 2013.

the AUSA responsible for the case. In such cases, the Director of TEOAF approves the sharing recommendations. AFMLS and TEOAF also obtain concurrence from each other and the State Department for each proposed sharing transfer to a foreign government after it is approved by their respective designees. This interagency approval and consultation process may be lengthy.

To avoid delays, it is advisable to make the international sharing recommendation as soon as practicable, or immediately after the final order forfeiting the foreign assets is obtained. At the earliest possible time and definitely before the asset has been liquidated, the seizing agency should note in any electronic asset tracking system, such as CATS, that a particular asset might be, is, or will be subject to an international sharing request or recommendation. In order to place a “hold” on an asset intended for international sharing, the seizing agency must either (1) select “international sharing anticipated” when creating the Standard Seizure Form (SSF), or (2) enter a sharing recommendation in the international sharing module. Either of these actions will prevent the asset from being shared domestically until a pre-approval or approval ruling is entered by AFMLS.

Lastly, countries are enacting laws with increasing frequency permitting them to share their domestically forfeited assets with other countries. Accordingly, if U.S. prosecutors or investigators assisted in a foreign case that resulted in a foreign forfeiture, they are encouraged to contact AFMLS to determine if it might be fruitful to submit a sharing request to that country.

Chapter 10:

Trustees, Monitors, Managers, and Custodians in Forfeiture Cases

I. Trustees, Monitors, Managers, and Custodians in Forfeiture Cases¹

A. Purpose

The purpose of this policy is to provide guidance for the use of a trustee, monitor, manager, custodian or other third party (together “third parties”) to assist the Department of Justice (DOJ) in specified federal forfeiture case activities pertaining to complex assets, business enterprises, and international seizures.

Historically, DOJ has used a variety of experts to accomplish its law enforcement objectives in complex forfeiture cases. Because an expert’s role may vary based on the facts of each case and the entity involved, there is no one method of selection that should necessarily be used in every instance.

Due to the labor-intensive nature and high cost of administering third party assistance, and the potential for ongoing litigation following entry of a final order of forfeiture, a third party asset manager should be appointed only when absolutely necessary, all other alternatives have been considered and rejected, and there is clearly sufficient net equity in the asset(s) to cover the total estimated cost of the third party and necessary staff. The Government generally should not seize or forfeit businesses which require such aggressive action, capital investment to remain competitive, or the assumption of considerable risk including either direct or contingent liabilities. In some cases, compelling law enforcement or policy considerations may warrant the appointment of a third party even though there is not sufficient equity in the enterprise to cover the cost. The least intrusive method of operating a business (in which all or a part of the enterprise or its ownership is subject to forfeiture) should be employed, particularly prior to entry of a final order of forfeiture.

In cases where the lead law enforcement agency is a Department of the Treasury or Department of Homeland Security agency, the federal prosecutor or investigator should consult the Treasury Executive Office for Asset Forfeiture (TEOAF) for guidance.

B. Statutory authority

Statutory authority, both specific and general, for the appointment of a third party in federal forfeiture cases is found in 18 U.S.C. § 983(j) (civil forfeiture) and 18 U.S.C. §§ 1963(d) and (e), and 21 U.S.C. § 853(e)-(g) (criminal forfeiture), and 18 U.S.C. § 983(j), which permit a court to act to preserve property.²

C. Special Considerations

In cases requiring the assistance of third parties to effectuate the forfeiture and liquidation of complex assets, comprehensive pre-seizure planning is mandatory. The procurement of the services of third parties who will be paid with government funds is generally subject to Federal Acquisition

¹ This chapter does not apply to the responsibility or authority of independent bankruptcy trustees, financial institution receivers and foreign liquidators not otherwise directly engaged in forfeiture case activities on behalf of the Government. USAOs and agencies interested in utilizing the services of a trustee to support the remission and restoration processes should refer to Chap. 12, Sec. A.4 of this *Manual*.

² 18 U.S.C. §§ 1964(a)-(b) grants courts broad injunctive and remedial authority in RICO cases.

Regulations (FAR).³ The procurement process to select and contract with these specialists may require a minimum of several months.

The U.S. Attorney's Office (USAO) must consult with the Asset Forfeiture and Money Laundering Section (AFMLS) before seeking the appointment of a third party in forfeiture cases. The U.S. Marshals Service (USMS) field office must notify headquarters when it becomes aware that a third party may be required.

D. Determining when a trustee, monitor, manager, or custodian should be engaged

In almost all forfeiture cases, the value of an ongoing business can be preserved without appointment of a third party through the issuance of a protective order. Generally, a protective order must be sought any time an ongoing business entity is targeted for forfeiture prior to seeking an appointment of a third party. This order should seek to restrain the owners from further encumbering the business, dissipating its assets, or selling the business except as authorized by court order. The business must be determined to be financially viable, before considering a monitor or trustee. Appointment of a third party will occur only when it is clearly necessary and all other alternatives have been considered and rejected. In some cases, compelling law enforcement or policy considerations might warrant the appointment of a third party even though there is not or may not be sufficient equity in the business enterprises to cover the costs of the third party. In such cases, the USAO must thoroughly document for AFMLS the reasons for rejecting alternatives to the appointment of a third party.

In the typical forfeiture case, where business property has been restrained criminally or civilly, the USMS is capable through either its own resources or with an existing property management contract of managing and selling property without the use of a third party. Moreover, the owners and managers of an ongoing business can often continue to operate the business pending the forfeiture unless probable cause exists to believe that they have been or are engaged in criminal conduct involving the business. In cases where the Government deems third party assistance is needed, the USAO, USMS, and AFMLS will determine how to obtain the assistance of a qualified third party. The USMS' Complex Assets Unit will provide a periodic analysis as to the business viability and whether it should continue to be operated under the stewardship of a third party arrangement.

Appointment of a third party may be appropriate depending on the nature of the criminal conduct and other factors discussed herein. The scope of oversight required in such cases depends on the stage of the case and the extent and nature of the ownership interest targeted for forfeiture (e.g., stock interests, partnership interests). For example, it is usually preferable simply to monitor a minority partnership or stock interest. Trustees generally should not be appointed to represent a minority interest because these interests may be divergent with the interest of the Government.

Alternatives to the appointment of a third party must always be considered with an eye to selecting the least intrusive and most cost-effective means of protecting the Government's interests while achieving its goals. Such alternatives include, but not without limitation, one or more of the following:

- (1) Obtaining a protective/restraining order, perhaps providing for USMS oversight, that specifies the consequences for violations of the order (such as the appointment of a third party in addition to a contempt citation);

³ See 48 C.F.R. Part 1.000 *et seq.*

- (2) Appointment of a business or property manager through a USMS contract;
- (3) Restraint or seizure of specific valuable assets, equipment, or inventory (restraint is preferred);
- (4) Oversight and/or management by state or local regulatory agencies;
- (5) Filing of a *lis pendens*;
- (6) Interlocutory sale;
- (7) Foreclosure by a lienholder;
- (8) Retention of a professional, upon the consent of the business and to be paid at its own cost, to oversee operations and finances and ensure against future criminal violations during the pendency of the forfeiture action;
- (9) Enforcement of state or local nuisance laws;
- (10) Seizure of property by federal or state tax authorities to satisfy outstanding tax obligations; and
- (11) Securing a performance bond.

The DOJ must strive to avoid involvement in managing any business where management may require aggressive action, significant capital investment from the Assets Forfeiture Fund (AFF) to remain competitive, or the assumption of considerable risk or liabilities. It may be permissible to restrain or seize such a business only if there is no effective alternative for accomplishing the Government's objectives.

II. Prerequisites to the Selection of a Trustee, Monitor, Manager, or Custodian: Pre-seizure Planning and Other Requirements

The appointment of a third party is to be made only after the all interested components (AFMLS, USAO, USMS, and investigative agencies) agree on a pre-seizure plan, as discussed below. The USAO is required to notify the USMS either through a local district office or directly to the USMS Complex Asset Unit as soon as it becomes aware that a third party appointment is being contemplated. In cases involving complex assets that require a third party, pre-seizure planning with the USMS is mandatory.

The guidelines for pre-seizure planning before seeking appointment of a third party require that a USAO:

- (1) Contact the USMS to engage in formal pre-indictment or pre-complaint planning prior to seizing or restraining complex assets, including businesses and real property;
- (2) Consult with AFMLS before commencing any action seeking forfeiture of, or seeking a temporary restraining order over, or seizure warrant against, an ongoing business;
- (3) Consult with the USMS prior to the submission filing of any proposed court orders to a court to restrain, seize, or impose property management and/or financial management requirements on property in USMS custody; and
- (4) Consult with AFMLS concerning the need for a third party.

Pre-seizure planning must include an assessment of the financial viability of any business as to which forfeiture is contemplated and a determination as to whether continued operation, or even a take-over, of the business will serve the best interest of the Government. The pre-seizure plan must develop (or include) an estimate, to the extent feasible, of the (1) net equity of the business or business assets as to which forfeiture is contemplated; (2) the current and projected cash flow of the business; (3) the anticipated fees and other costs of the third party and the source for paying these fees; and (4) the likely duration of the third party assistance.

If it is contemplated that a targeted business will continue in operation pending forfeiture, a business review must be undertaken once the USMS' Complex Assets Unit issues a protective order to obtain access to business records and other information relating to the financial viability of the business that specifically identifies the challenges facing the business and what will be required for it to remain viable pending the forfeiture. The business review must identify and consider key historic financial data for the business, its current operating environment (including financial activity), and financial projections for the next two years. These projections should include both best- and worst-case scenarios for the business operations as well as "exit strategies" should conditions change for the worse. If the business is likely to lose money or be sold at a loss, the business plan should include plans to mitigate such losses or liquidate all or parts of the business.

During the pre-seizure phase or while an indictment is under seal diligent care should be taken to maintain confidentiality and secrecy, particularly as to any grand jury information. While agency components are reviewing investigative business and financial records to develop a proposed business plan, appropriate measures must be taken to ensure that sensitive law enforcement information remains protected and that all required disclosure orders are obtained for grand jury information.

III. Qualifications of Trustees, Monitors, Managers, and Custodians

The necessary qualifications required of a third party will largely depend on the purpose of the third party assistance. For example, if the singular purpose of the assistance is to manage the business and prevent dissipation of its value, the qualifications will likely include a business management and accounting background as well as expertise in a particular industry or specialized operational activity. It will often be necessary for the third party to comply with various reporting and legal requirements (e.g., taxes, securities, environmental) pertaining to the business. If a third party detects or suspects ongoing criminal activity or evidence of past criminal conduct, he or she should be directed to contact and coordinate with the designated prosecutor or supervisory case agent.

The restraining order or other order appointing a third party engaged by the Government must define the goals of the third party. Prior to appointment, an initial assessment must be made by the Government to determine the purpose of and need for the assistance (i.e., to prevent dissipation of the asset or to prevent the enterprise from engaging in illegal activity, or both), as well as its goals.

The theory of forfeiture under which the property is seized and the nature of the business itself will inform the goals and duties of the third party. For example, if the business subject to forfeiture was acquired with proceeds of illegal activity and is self-supporting or is subject to forfeiture as a substitute asset, the goal of the Government generally is to prevent dissipation of the business and its assets. Monitorship or trusteeship of such an asset usually requires less oversight and more often results in a profitable forfeiture than the forfeiture of an enterprise used to facilitate illegal activity.

IV. Trustee, Monitor, Manager, and Custodian Expenses

Assistant U.S. Attorneys (AUSAs) and USMS personnel must be aware that the costs of a third party in a forfeiture case are authorized expenses under the AFF statute, 28 U.S.C. § 524(c)(1)(D) & (E).

AFMLS and the Asset Forfeiture Management Staff (AFMS) must be notified as soon as the USAO, Investigative Agency or USMS learns or anticipates that a seized or restrained business will lose money, has contingent or direct liabilities which the Government will be responsible for, or has insufficient equity.⁴ If the restraint, seizure and/or forfeiture of a business could create a deficit to the AFF, prior approval from AFMS, in coordination with AFMLS, is required. Once it is determined that operation of the business is not financially viable, the USAO should exclude or seek to dismiss the business from the forfeiture action, if possible, or close and wind up the business as soon as practicable, obtain any necessary court orders to accomplish this end, while giving due regard for the ownership rights of the defendant/owner (prior to forfeiture) and other partners, shareholders, and parties of interest. Alternatively, the business and/or its assets might be sold by interlocutory sale, with the assets of the business sold and disposed of, even if such sale may result in a loss.

In general, the Government should not enter into a contract to pay for the services of a third party from the AFF unless or until a determination is made that forfeiture is likely and the business revenues and/or proceeds from the eventual sale justify those costs in addition to any assumed and contingent liabilities and disposal costs.

⁴ See *U.S. Attorney's Manual* 9-111.124 ("Due to the complexities of seizing an ongoing business and the potential for substantial losses from such a seizure, a United States Attorney's Office must consult with the Asset Forfeiture and Money Laundering Section prior to initiating a forfeiture action against, or seeking the seizure of, or moving to restrain an ongoing business."). See also 9-105.330 (requiring consultation with AFMLS before the USAO seeks to forfeit, seize, or restrain a business based on its involvement in money laundering).

Chapter 11: Litigation Issues: Legal and Ethical

I. Avoiding Accusations of Vindictive Prosecution

Relying primarily on the different burdens of proof applicable to criminal as opposed to civil cases, the Supreme Court has held that an acquittal in a criminal case does not bar a subsequent civil forfeiture action. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972). However, prosecutors initiating a civil forfeiture proceeding after a decisive event in a concurrent criminal case should be mindful of the potential for a claim of vindictiveness.

In *United States v. Goodwin*, 457 U.S. 368 (1982), the Supreme Court held that prosecutors possess wide discretion in making charging decisions. In the few cases where the Court has found it necessary to presume vindictiveness, it has done so where the defendant has exercised some right and there exists reasonable likelihood that the prosecutor acted vindictively in response to the assertion of that right.¹ The prosecutor can overcome this presumption by providing the court with objective evidence supporting the prosecutor's decision.²

Though it is difficult to generalize, the following considerations influence the vindictive prosecution analysis. One consideration is the timing of the prosecutorial decision at issue. Decisions made in a pre-trial setting, at a time when the prosecutor may still be discovering and assessing relevant information, are less likely to merit a presumption.³ In contrast, a prosecutorial decision made after trial begins is more likely to merit a presumption.⁴ A second consideration is the nature of the right the defendant seeks to invoke. If the defendant merely invokes pre-trial procedural rights, e.g., the right to a jury trial, to move to suppress, to plead an affirmative defense, or to challenge the sufficiency of the indictment, "it is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter."⁵ In contrast, if the defendant invokes a right to a new trial to collaterally challenge the conviction, the likelihood of vindictiveness may be greater.⁶

However, even after decisive events have occurred in the criminal case, e.g., a jury has returned a verdict of acquittal against one or more of the defendants, there are often sound reasons why a prosecutor may decide to pursue an alternative remedy such as civil forfeiture. For example, the Civil Asset Forfeiture Reform Act (CAFRA) of 2000 grants the Government 90 days after a claim is filed contesting the forfeiture of an asset in which to commence a judicial forfeiture proceeding against that same asset. A prosecutor who elects to file a forfeiture case within that 90-day period—even if a decisive event occurs in the criminal case before the expiration of the 90-day period—would not be acting vindictively.

¹ *United States v. Goodwin*, 457 U.S. 368, 373 (1982).

² *Id.* at 376, n.8.

³ *Id.* at 377.

⁴ *Id.*

⁵ *Id.* at 381.

⁶ See *Blackledge v. Perry*, 471 U.S. 21 (1974) (defendant exercised his right to a trial de novo and consequently, during the retrial, the state increased the charge from a misdemeanor to a felony; the Court held that although there was no evidence that the prosecution acted vindictively by increasing the misdemeanor charge to a felony, the concern is the defendant's "fear of such vindictiveness" may deter him from exercising his legal right to appeal, violating due process).

Given these considerations, care also should be exercised to avoid the appearance that the Government has pursued criminal charges vindictively because the defendant exercised a right in the parallel civil forfeiture proceeding.⁷ If the criminal charge follows a routine pre-trial event in the civil forfeiture case, e.g., the filing of an administrative or judicial claim, the risk of a court indulging a presumption of vindictiveness is negligible.⁸ In contrast, if the defendant prevails on the merits of a civil judicial forfeiture case, and criminal charges come afterwards, the prosecutor should be prepared to articulate the reasons for the timing of the criminal charges.

The vindictive prosecution issue can likely be avoided altogether if the civil forfeiture action is filed (and stayed) before the criminal case is concluded. While this involves extra work, if the prosecutor can anticipate that there is a substantial chance of acquittal, and that the Government will pursue civil forfeiture in such an event, filing the civil forfeiture case before adjudication of the criminal case can be a useful method to avoid the issue of vindictiveness altogether.

II. Negotiating With Fugitives

A. Summary

Absent compelling circumstances, prosecutors should not negotiate with fugitives. Before undertaking such negotiations, prosecutors should exhaust all potentially viable pre-trial motions, including any possible fugitive disentitlement motion. Even when the case cannot be resolved by pre-trial motion, prosecutors should enter into negotiations reluctantly. In many instances, the policy considerations of declining to negotiate with fugitives will outweigh the potential benefit to an individual civil forfeiture case. Only in instances where other considerations, e.g., the cost of maintaining the asset subject to forfeiture, militate towards negotiating a settlement should prosecutors entertain fugitive negotiations. In such circumstances the prosecutor handling the negotiations should consult closely with the prosecutor handling the parallel criminal case.

B. Discussion

Periodically, a situation arises where an individual has been indicted, becomes a fugitive, and seeks to challenge or negotiate with the Government regarding a civil forfeiture case. Prior to the enactment of CAFRA, a fugitive in a related criminal case was not barred from opposing the civil forfeiture of property: *Degen v. United States*, 517 U.S. 820 (1996) (fugitive disentitlement doctrine cannot be created by case law); *United States v. Funds Held in the Name of Wetterer*, 17 F. Supp. 2d 161 (E.D.N.Y. 1998) (because of *Degen*, claimant that is alter ego of fugitive may file claim challenging forfeiture of bank account held by perpetrator of mail fraud/child sex abuse scheme who is resisting extradition in Guatemala); *United States v. One 1988 Chevrolet Cheyenne Half-Ton Pickup Truck*, 357 F. Supp. 2d 1321 (S.D. Ala. 2005) (tracing the history of the fugitive disentitlement doctrine and discussing the impact of *Degen*).

⁷ See *United States v. Boulter*, 799 F. Supp. 581 (W.D.N.C. 1992) (“A defendant may be able to prove vindictive prosecution in a case such as the instant one in which the Government prosecutes the defendant after he files a claim in a civil forfeiture action.” However, the defendant did not pursue such a claim, and thus, the court did not address it further).

⁸ *United States v. White*, 972 F.2d 16 (2d Cir. 1992) (prosecution indicted defendant after he subsequently challenged the forfeiture of his vehicle; court declined to hold that by opposing the Government’s forfeiture, the Government should be precluded from bringing criminal charges).

CAFRA reinstated the fugitive disentitlement doctrine with the passage of 28 U.S.C. § 2466, which permits a court to “disallow a person from using the resources of the courts of the United States in furtherance of a claim in any related civil forfeiture action or a claim in third party proceedings in any criminal forfeiture action” if certain conditions are met. *See Collazos v. United States*, 368 F.3d 190 (2d Cir. 2004) (section 2466 is Congress’s response to the Supreme Court’s decision in *Degen*; it does not violate the claimant’s constitutional right to due process); *One 1988 Chevrolet Cheyenne Half-Ton Pickup Truck*, 357 F. Supp. 2d at 1326 (section 2466 is a “forceful legislative response” to the void created by *Degen*).

While it may have made financial sense to negotiate with fugitives when they were allowed to litigate civil forfeiture actions, the Government now has less incentive to negotiate with those who are barred by the fugitive disentitlement doctrine from challenging a forfeiture. If a court agrees to apply the fugitive disentitlement doctrine, the Government should be able to obtain a default judgment, at least as to the fugitive’s interest, in most cases. Thus, there would be no reason to negotiate with a party who is barred from challenging a forfeiture, and negotiation is thus discouraged in that circumstance.

Even in cases where a court may decline to apply the fugitive disentitlement doctrine, the Government may be able to prevail on a pre-trial motion.⁹ For example, fugitives often will decline to appear for deposition or otherwise participate in discovery. Rule 37, Federal Rules of Civil Procedure, allows the court to order a party to comply with a discovery request, and if the party fails to comply, the court can impose sanctions that include (1) an order that certain facts shall be taken as established, (2) an order refusing to allow the disobedient party to support or oppose designated claims or defenses or introduce matters in evidence, and (3) rendering judgment by default against the disobedient party. Fed. R. Civ. P. 37(b)(2).

Where pre-trial motions are not viable or are unsuccessful, prosecutors should pursue negotiations with fugitives reluctantly, and only as a last resort. As a general matter, it is rarely in the Government’s interest to negotiate with fugitives. *See In re Grand Jury Subpoenas Dated March 9, 2001*, 179 F. Supp. 2d 270, 277 (S.D.N.Y. 2001) (noting a response by the U.S. Attorney’s Office (USAO) in the Southern District of New York in the Marc Rich case that “it is our firm policy not to negotiate dispositions of criminal charges with fugitives. Such negotiations would give defendants an incentive to flee, and from the Government’s perspective, would provide defendants with the inappropriate leverage and luxury of remaining absent unless and until the Government agrees to their terms.”). Forfeiture Assistant U.S. Attorneys (AUSAs) should be sensitive to these considerations and not take any actions that may undermine the policy considerations noted in the Rich case, and should in all circumstances coordinate closely with prosecutors handling the parallel criminal case.

In the exceptional case where negotiations with a fugitive are appropriate, prosecutors should limit the factors that influence the conduct of the negotiations. It is legitimate to take into account the Government’s litigation risk at trial, or expenses the Government may incur in maintaining an asset if the case would otherwise be delayed indefinitely. For example, if the forfeiture involves tangible property that is incurring storage expenses or property where a lien is continuing to accrue and erode the equity, it may be in the Government’s financial interest to resolve the forfeiture matter quickly. If a court declined to invoke the fugitive disentitlement doctrine, negotiation may be necessary in order to resolve the matter. But in no circumstances should a prosecutor agree to exchange assets for a defendant’s agreement to surrender and face criminal charges.

⁹ Section 2466 “does not mandate the court to disallow the claimant,” but rather confers upon the Court discretion to determine whether or not disentitlement is warranted.” 357 F. Supp. 2d at 1328.

III. Criminal Forfeiture and *Brady* Obligations

In criminal forfeiture matters, the Government has not only an ethical but also a legal duty to disclose information favorable to the defendant as to either guilt or punishment. *See Brady v. Maryland*, 373 U.S. 83 (1963) (“suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution”).¹⁰ Forfeiture is an element of the sentence, and thus forms part of the punishment imposed on the defendant. *Libretti v. United States*, 516 U.S. 29, 38-39 (1995). Accordingly, *Brady* requires the Government, even absent a request by the defendant, to disclose evidence favorable to the defendant that relates to criminal forfeiture.

IV. Ethical Considerations Relating to Global Settlements and Dealing with Claimants and Witnesses

In situations where both a civil forfeiture proceeding and a related criminal investigation or charges are pending, forfeiture attorneys may face various ethical issues. Issues generally arise in the context of settlements and plea agreements, and in dealings with witnesses. Some of these issues are set out below, with references to certain pertinent authority; however, in addition to the materials identified here, you should consult the rules that apply in the state in which you are licensed as well as the state and court(s) in which the proceedings are pending.¹¹

A. Global settlements

The term *global settlement* is often used to describe a situation whereby criminal charges and civil forfeiture claims are resolved in a single agreement between the Government and the defendant. While such agreements are often recommended, being both effective and efficient in resolving disputed matters, they raise ethical issues that should be considered.

No settlement agreement should be used to gain an improper advantage in a related civil or criminal case: the Government should not agree to release property subject to forfeiture (civil or criminal) in order to coerce a guilty plea on the substantive charges; nor should the Government agree to dismiss criminal charges in order to coerce a forfeiture settlement.¹²

Care should be taken to avoid any plea/settlement agreement that risks undermining faith in the fairness of those who administer the criminal process, such as an agreement which appears to reduce prison time in exchange for forfeiture, or vice versa.¹³

A prudent practice followed by many government attorneys is that of not introducing or suggesting a global settlement disposition. If opposing counsel raises the issue, it may be responded to and

¹⁰ *United States v. Agurs*, 427 U.S. 97, 110-11 (1976), extended the rule announced in *Brady* to apply to evidence that “is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request.”

¹¹ *See* 28 U.S.C. § 530B (DOJ attorneys are “subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.”)

¹² *See* Chap. 3, Sec. I.B.7 of this *Manual*; *United States Attorneys’ Manual* 9-113.106; *see also Grand Jury Manual* (July 2000), chapter 12, “Parallel Proceedings,” para. 12.16, “Global Settlements,” (noting that, although *ABA Model Code of Professional Responsibility*, DR 7-105(A), which prohibited attorneys from threatening criminal prosecution solely to obtain an advantage in a civil matter, was replaced by the *ABA Model Rules of Professional Conduct* which omitted this provision (*see ABA Formal Ethics Opinion* 92-363 (1992)), many states still have ethical rules patterned after DR 7-105(A)).

¹³ *See Town of Newton v. Rumery*, 480 U.S. 386, 400 (1987) (O’Connor, J., concurring).

pursued by government attorneys in close consultation with supervisors, and being mindful of the relevant ethical issues.¹⁴

B. Claimants and witnesses

The same ethical considerations as those which apply in global settlements, above, also apply in situations where the Government attorney is interacting with claimants and witnesses in civil forfeiture litigation in circumstances which may raise issues of fairness and proper conduct.

These issues may occur in all situations where the line between the Government's civil litigation and prosecutorial functions may become blurred, and where there may be potential for consolidating governmental power against individuals in a way which could become abusive. While there is no ethical prohibition on conditioning the subject's status in a prosecution on that person's cooperation, care should be employed when the subject's cooperation is sought solely in connection with a civil forfeiture matter. Where, for example, a civil forfeiture action and a related criminal investigation or charges are pending at the same time, a claimant or witness may be required to take action in the civil forfeiture case, such as providing testimony in a deposition, where there is a perceived threat of criminal prosecution. In such cases care should be taken not to coerce cooperation or the providing of testimony in the civil case by threats or promises relating to the criminal proceedings.¹⁵ Nor should civil forfeiture discovery or other proceedings be used solely to obtain information or benefit for the criminal proceeding.¹⁶

Ethical issues may arise in a situation where an individual, not currently charged with a crime but involved in the offense, has relevant information that would aid the Government in pursuing a civil forfeiture case. Clearly if the situation arose in a criminal case there would be nothing improper about the prosecutor advising the witness that if he did not tell the truth about what he knew, he could be charged for his own involvement in the crime, assuming there was evidence to support a prosecution. Generally, the same should be true in a civil case scenario. However, even though there is no blanket prohibition against threatening a prosecution to persuade someone to take a particular action in a civil matter, government attorneys must take care to ensure that any threat of prosecution is not solely to gain an advantage in the civil matter (i.e., to ensure that the criminal charges would be brought for some legitimate purpose in addition to gaining an advantage in the civil action), that it is related to the civil case, and that it is well-founded.

¹⁴ See *Grand Jury Manual* (July 2008), chapter 12, "Parallel Proceedings," para. 12.12, USABook Online.

¹⁵ A claimant or witness in a civil forfeiture proceeding who is also a defendant in a pending criminal case may want to cooperate in the civil case in the hope that such cooperation may be a factor in supporting a motion by the Government for reduction of sentence pursuant to section 5K1.1 of the Sentencing Guidelines; however, it is not clear whether or to what extent cooperation in a civil forfeiture case would constitute a factor under section 5K1.1, though it is clear that the Guidelines expressly separate a defendant's sentence from his/her forfeiture of property. See *U.S. v. Hendrickson*, 22 F.3d 170, 175 (7th Cir.) (section 5E1.4's explicit language that "[f]orfeiture is to be imposed upon a convicted defendant as provided by statute" makes it "readily apparent that forfeiture was considered by the Sentencing Commission and was intended to be imposed in addition to, not in lieu of, incarceration") *cert. denied*, 513 U.S. 878 (1994).

¹⁶ See *Grand Jury Manual*, *supra*, at. 12.10, "Abuse of Power Claims" ("person subject to parallel proceedings may raise a claim of having been manipulated or misled by the Government in a variety of contexts," including motions to suppress evidence, motions to deny enforcement of civil subpoenas, and motions to dismiss indictment (citing cases)); see also *In re Phillips, Beckwith & Hall*, 896 F. Supp. 533 (E.D. Va. 1995) (law firm moved to stay forfeiture action in view of potential criminal charges against firm personnel; court denied stay, noting that allegation of "bad faith on the Government's part by, for example, pursuing a civil lawsuit solely for the purpose of aiding a criminal investigation, or threatening or delaying bringing criminal charges in order to extract an advantage in the civil case by keeping the cloud of criminal prosecution overhead" would have produced different outcome (citing cases)).

In the context of settling civil forfeiture cases, care should be taken by the government attorney handling the civil case not to harm the Government's criminal prosecution, such as in a case where, for example, we compromise a civil forfeiture case to the benefit of a defendant/witness who has already entered into a cooperation agreement with the Government. In that circumstance the civil forfeiture settlement may be viewed as a benefit to the cooperating witness which we have to disclose, and which may be used to impeach the cooperating witness on cross-examination. Prior to negotiating a civil forfeiture settlement with a cooperating witness/defendant in a pending criminal case, the government forfeiture attorney should consult with the government attorney prosecuting the criminal case.¹⁷ Ethical issues may also arise where government attorneys include cooperation provisions in civil forfeiture settlements. Such provisions, which may provide for assistance or cooperation by the claimant in other civil forfeitures or in related criminal proceedings, create no ethical problems so long as the settlement agreement itself stands on its merits, and if it calls for cooperation in a criminal case, does not run afoul of ethical considerations relating to the interplay of civil and criminal cases noted above.

Again, ethics rules vary from state to state, and it is strongly recommended that each attorney dealing with related civil forfeiture and criminal cases consult the rules that apply to the states in which the attorney is licensed and the action is pending, as well as consulting the ethics advisor in the USAO.

V. Fifth Amendment Advisements in Civil Forfeiture Cases

The procedural safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966) protect the Fifth Amendment rights of a person not to be compelled in a criminal case to be a witness against himself. The Court held that unless a suspect in a *custodial* interrogation is first warned of his or her right to remain silent, and to have an attorney, provided at no cost, if necessary, before questioning, statements made by the suspect would not be admissible at trial. *Id.* at 492. The Court's primary concern was the coercive atmosphere surrounding a person in custody who is subject to interrogation by the police. *Id.* at 457-58. Because these conditions typically are not present in the context of a deposition of a witness or claimant in a civil forfeiture case, the Constitution does not require prosecutors to warn the witness of his or her rights against self-incrimination prior to questioning in a civil deposition. *See, e.g., United States v. Solano-Godines*, 120 F.3d 957 (9th Cir. 1997) (*Miranda* warnings are not required before questioning in a civil deposition hearing). Consequently, statements, including those which might be self-incriminating, made in the course of a deposition in a civil forfeiture case are admissible in the proceeding even in the absence of *Miranda* warnings because deposition proceedings are civil in nature and are not criminal prosecutions.

Nonetheless, in civil forfeiture cases where the deponent is known to the Government to be a target or subject of a parallel criminal investigation or prosecution, government attorneys may wish to consider either deferring the deposition, or taking the deposition but giving an advisement that draws elements from those advisements that prosecutors routinely give targets and subjects in federal grand jury practice. For example, before taking the deposition in a civil forfeiture case of an unrepresented claimant or witness who is a target of a parallel criminal investigation, the advisement may state simply:

You are advised that you are a target of a parallel federal criminal investigation. You may refuse to answer any question in this proceeding if a truthful answer to the question would tend to incriminate you. Anything that you do or say may be used against you in this proceeding, in a criminal proceeding, or in any other subsequent legal proceeding.

¹⁷ See Chap. 3, Sec. I.B.2 of this *Manual* (stating that the seizing agency must also be consulted in connection with settlement negotiations).

Include if applicable:

If you are represented by appointed counsel in a related criminal case, you have a right to ask the court to appoint counsel for you in this proceeding.

Or:

If you are using the real property which this case seeks to forfeit as your primary residence, you have a right to ask the court to appoint counsel for you in this proceeding provided you show that you are financially unable to obtain counsel.

In contrast, before taking the deposition of a deponent who is a target, but who is represented, the advisement may simply state: “You are advised that you are a target of a parallel criminal investigation.”

The suggestion that a government attorney may want to give an advisement to a deponent in certain civil forfeiture cases rests on several considerations. In grand jury practice, DOJ policy requires prosecutors to give criminal targets and subjects Fifth Amendment advisements in a target letter, and repeat those advisements on the record before the grand jury. *See USAM 9-11.151; Criminal Resource Manual* 160 (sample target letter). In the case of targets, the Department’s policy goes further. Prosecutors must advise the person that he or she is a target of a criminal investigation. *See Grand Jury Practice Manual*, § 7.4. These policies exist notwithstanding the lack of a clear constitutional imperative requiring prosecutors to give any advisements to targets or subjects in the context of grand jury practice. *See United States Attorneys’ Manual* 9-11.151; *see also Grand Jury Practice Manual*, § 7.4. While there is no constitutional right to an attorney in a civil forfeiture proceeding, certain indigent claimants may have a statutory right to counsel. The court may authorize counsel for an indigent claimant with standing to contest the forfeiture who is represented by court-appointed counsel in a related criminal case. *See* 18 U.S.C. § 983(b)(1)(A). And, upon the request of an indigent party in a civil forfeiture action brought by the Government to forfeit that person’s primary residence, the court “shall ensure that the person is represented by an attorney....” *See* 18 U.S.C. § 983(b)(1)(B). An advisement also enhances the likelihood that if the testimony is offered in a criminal prosecution, it will be admitted. Finally, the advisement helps rebut a claimant’s subsequent arguments that he was not aware of the Fifth Amendment right, or, in the case of certain indigent claimants, was not aware that he may have the right to counsel in the civil forfeiture case. *See* 18 U.S.C. § 983(b); *see also* 18 U.S.C. § 981(g)(2) (authorizing a claimant to move to stay a civil forfeiture proceeding based on Fifth Amendment concerns)

VI. Preservation Policy for Civil Forfeiture

A. The legal obligation

There is a legal duty to preserve potentially relevant evidence once a party reasonably anticipates litigation, whether the United States is the plaintiff or defendant. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003); Fed. R. Civ. P. 37, Advisory Committee Note, 2006 Amendments, Subdivision (f). Although a litigation hold is the primary method of preservation, reasonableness and good faith are the ultimate standards by which an alleged breach of the duty to preserve is judged. A breach of the duty to preserve may be the basis for discovery sanctions if the United States fails to produce relevant electronically stored information (“ESI”) or tangible items.

Preservation should be distinguished from production under the Federal Rules of Civil Procedure that govern discovery and from admissibility under the Federal Rules of Evidence. The fact that information may be work product, otherwise privileged, or inadmissible does not obviate the duty to preserve and the fact that information is preserved does not necessarily mean it will be produced.

The practical guidance below applies equally to DOJ attorneys (including AUSAs) and to investigative agency counsel. The guidance does not apply to attorneys at independent agencies. Mentions of “the DOJ” or “a DOJ attorney” do not refer to investigative agency counsel, regardless of that fact that investigative agencies such as the DEA, FBI, and ATF, and their attorneys, fall under the DOJ umbrella. Thus, there is a distinction drawn between “the DOJ” and “agencies” or “agency counsel” for the purposes of this policy.

Except where this policy clearly addresses the particularities of a situation where a DOJ attorney is assigned to a case and he or she initiates the call for a litigation hold, agency counsel may still wish to take note of the practical guidance in Sections VII.A-D, in the event that they enact a litigation hold in the administrative context, to the extent that it does not contradict internal agency procedure relating to litigation holds.

B. The trigger

The obligation to preserve evidence arises when a party has notice that evidence is relevant to litigation or when a party reasonably anticipates litigation and foresees that the evidence may be relevant to that future litigation. When a DOJ attorney assigned to a case determines that an event triggers the obligation, he or she should advise participating agency counsel to implement a litigation hold. In administrative forfeiture cases, relevant agency counsel should determine whether a litigation hold is necessary and appropriate and follow the guidance below, as applicable.

Where a case has been assigned to a DOJ attorney, he or she should advise the relevant agency or agencies to enact a litigation hold no later than:

- (1) **Seizure/Restraint:** The time at which a seizure warrant is obtained for property that, by statute, may not be administratively forfeited or for which the seizing agency lacks administrative forfeiture authority.
- (2) **Claimant Action:** Upon service or actual notice, whichever is earlier, of the filing of a complaint or other pleading; or, upon receipt of a motion for return of property or notice of other action regarding seized or forfeited property.
- (3) **Reasonable Certainty:** When the DOJ attorney receives a referral to file a judicial forfeiture action, the time when it is reasonably certain that the DOJ will indeed file a complaint or a motion for extension of time to file a complaint (as opposed to declining the matter or pursuing criminal forfeiture instead).
- (4) **Special Circumstances:** When the DOJ attorney advises, if he or she determines that special circumstances exist that warrant the immediate preservation of relevant information.

Administrative seizures do not often lead to litigation, and in most cases, will not trigger a litigation hold. However, there may be situations where agency counsel develops a reasonable belief that litigation will ensue. In those circumstances, agency counsel may wish to consider the propriety of a litigation

hold or other method of preserving relevant information, proportional to the threat of future litigation. Events that *may* lead an agency to reasonably believe that litigation will occur include the following:

- (1) The filing of a claim
- (2) The investigation of a certain target and/or certain assets
 - Does anything in the pre-seizure planning stage suggest that litigation is reasonably foreseeable?
- (3) Seizure
 - Were the assets seized particularly large, valuable, or rare?
 - Was there considerable publicity surrounding the seizure or the parties involved?
 - Did the owner or his or her attorney make it known to agents that a claim would likely be filed, either through words or actions?
 - Based on prior experience, is defense counsel known to aggressively file claims?

C. Information subject to preservation

C.1 Scope

The scope of the litigation hold defines what information is relevant and defines the sources (physical locations) of such documents, tangible items, and ESI. Relevant information is anything that the United States knows, or reasonably should know, relates to the foreseeable claims or defenses of any party or is likely to lead to the discovery of relevant information. There is no duty to retain every piece of paper. The DOJ attorney should determine relevance in consultation with the custodians of information, who, in an asset forfeiture matter, include persons at agencies in possession of the relevant case files. Scope is a fact-specific inquiry, the parameters of which should be explained in detail by the DOJ attorney on a case-by-case basis. The initial decision to preserve and the subsequent mechanisms chosen to fulfill the obligation should be guided by reasonableness and proportionality.

Relevant information should be preserved as it is kept in the usual course of business. Duplicates do not need to be retained. ESI should be maintained in native format.¹⁸ Any agency advised to implement a litigation hold should ensure that all materials designated by the DOJ attorney as within the scope of the hold are, in fact, retained, and retained in the form specified.

C.2 Relevant time frame

All relevant information in existence at the time when the duty to preserve attaches should be retained, as well as relevant information created thereafter, until the DOJ attorney or agency counsel advises otherwise.

¹⁸ “Native format” answers the need to produce “reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case.” See “The Sedona Conference Commentary on Legal Holds: The Trigger and the Process,” 11 *Sedona Conference Journal* 265, 278 (2010), available at <https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Legal%20Holds>.

The starting point for information that should be captured by the litigation hold is no later than:

- the date the investigation began; or
- the date of the relevant seizure.
- The point at which information will no longer require preservation under the litigation hold is no earlier than:
 - the date when the forfeiture decision is final and non-appealable;
 - the date upon which the time for filing an appeal or petition for a writ of certiorari expires; or,
 - another date as the DOJ attorney or agency counsel advises.

D. The litigation hold notice

D.1 Who issues

The DOJ attorney or agency counsel advises the relevant agency or agencies to implement the litigation hold. The DOJ attorney should be responsible for (1) preserving documents created or received by that attorney, (2) guiding other members of his or her office, and (3) advising and monitoring preservation efforts at the agency or agencies.

The practical duty of preservation remains on agency staff, except as it relates to documents within the possession of DOJ. Proper execution of the duty to preserve includes consulting with Information Technology (IT) personnel, guiding the individual custodians of information, and following the instructions in the litigation hold notice as provided by the DOJ attorney or agency counsel.

D.2 Who receives

All agencies should designate an attorney within the agency as the *preservation point person* to receive litigation holds from the DOJ attorney and to transmit such notices to custodians of relevant information.

Key custodians should receive the litigation hold notice from their preservation point persons at the agencies. These custodians may include, non-exclusively, counsel's office attorneys assigned to the case, case agents, and any other players who may have produced or received information relevant to the case. The list of key custodians may be amended and the hold notice should be sent to new persons as needed. The DOJ attorney should be notified of all key custodians and any changes to that list made by the agency preservation point persons.

The DOJ attorney and agency preservation point person should take particular care that the relevant documents and information are retained when key custodians leave their respective agencies or are reassigned. New employees should be apprised of existing litigation holds relevant to their assignments when they assume their positions.

D.3 Multiple agency situations

When more than one investigative agency works on a particular case—whether in a task force setting, through informal coordination, or under adopted seizures from state and local agencies—the DOJ attorney should consult with the lead agency to ascertain which entities, exactly, participated in the

investigation. The DOJ attorney should inquire as to which other agencies may be involved and communicate with the designated preservation point persons at all additional, participating agencies. The lead agency point persons should provide the DOJ attorney with the contact information of the preservation point persons at the other agencies involved in the case no later than the date specified by the DOJ attorney so that he or she can determine the scope of the hold and send the litigation hold notice to the lead and all other participating agencies.

D.4 Format

Best practice entails a *written* litigation hold (“urgent” email is the preferred method). The DOJ attorney should attach a written (electronic) agreement to comply along with the litigation hold notice and require an affirmative response from all recipients by a certain date. In a multiple agency situation, all litigation hold recipients should be able to view the entire list of addressees. Such access enables the recipients to identify an agency that may have relevant information in its files, but was erroneously overlooked in the DOJ attorney’s initial email advising the agency or agencies to implement a litigation hold.

D.5 Content

At a minimum, the litigation hold notice should contain:

- names of any foreseeable parties in the anticipated litigation;
- time frame during which relevant information has been or will be created;
- affirmative directions to preserve information and prohibitions on destruction/deletion;
- instructions to initially separate information believed to be privileged from other preserved information;
- expectations for compliance, consequences of non-compliance, and method of monitoring compliance;
- instructions on how to proceed when the recipient believes the hold inadvertently excludes relevant information, sources of data, or entities likely to possess information;
- an agreement to comply with the hold, to be signed and returned by a certain date;
- a summary of the claims, defenses, or issues raised by the anticipated litigation and/or trigger;
- scope of the hold and any limitations on it;
- mechanisms for the collection of preserved ESI, tangible items, and documents;
- any technological aspects of IT systems that could help/hinder preservation;
- procedure for how the hold may be expanded, diminished, and terminated; and,
- contact information of the advising attorney.

D.6 Ongoing duty

The DOJ attorney who advises an agency to issue a litigation hold should:

- keep a log of all steps taken to initiate and maintain a litigation hold, including a record of communication with agency point persons and a concise statement of the reason any significant decision on preservation was made;
- periodically review the litigation hold to determine whether to maintain, diminish, or expand its scope in light of the evolving claims, defenses, and issues in the case;
- document changes made to the scope of the litigation hold or list of key custodians;
- periodically review compliance with the hold, in consultation with the preservation point person at the agency(ies);
- send a reminder notice, electronically, to all recipients of the litigation hold notice, including agency preservation point persons, every 90-120 days; and
- promptly notify, electronically, all recipients of any modifications to the scope of the hold.

D.7 Removing a hold

The advising DOJ attorney should not make the decision to lift a litigation hold until after the time for filing direct appeals in the case (and related or ancillary proceedings) or a petition for a writ of certiorari has passed. If a DOJ attorney was never assigned to the case but agency counsel issued a litigation hold independently, the hold may be removed when the time for a claimant to file a claim contesting the forfeiture has passed. The DOJ attorney or agency counsel should electronically notify all recipients of the litigation hold notice that the need for the hold has ended and that they may cease preserving information related to the case.

Chapter 12:

Forfeiture and Compensation for Victims of Crime

Forfeiture is a critical tool in the recovery of illicit gains arising from financial crimes such as fraud, embezzlement, and theft. With respect to property that is judicially forfeited under the criminal forfeiture statutes, the Attorney General has the authority to grant petitions for remission or mitigation of forfeiture and restore forfeited property to victims. *See* 21 U.S.C. § 853(i)(1).¹ In civil judicial forfeitures pursuant to section 981, the Attorney General has the authority to restore forfeited assets to the victims of any offense giving rise to forfeiture. Accordingly, remission and restoration authority now exists for virtually all offenses for which a related civil or criminal forfeiture order is obtained.

In concert with this expanded remission authority, the Criminal Division initiated a procedure in 2002 called restoration. This procedure enables the Attorney General to transfer forfeited funds to a court for satisfaction of a criminal restitution order, provided that the victim named in the order otherwise qualifies for remission under the applicable regulations. While remission and criminal restitution are not directly related, they may serve similar functions. Remission is discretionary relief intended to reduce the hardship that may arise from forfeiture for persons who have incurred a monetary loss from the offense underlying the forfeiture. Restitution is an equitable remedy that is intended to make crime victims whole and prevent unjust enrichment to the perpetrator. In many cases, restoration—the use of forfeited funds to pay restitution—is desirable, since the defendant may be left without assets to satisfy his or her restitution obligation following forfeiture.

Priority in the distribution of forfeited assets is given to valid owners, lienholders, federal financial regulatory agencies, and victims (in that order), who in turn have priority over official use and equitable sharing requests.

The Treasury Forfeiture Fund (TFF) has a similar procedure for remission and restoration. Please consult the *Guidelines for Treasury Forfeiture Fund Agencies on Refunds Pursuant to Court Orders, Petitions for Remission, or Restoration Requests* (“Treasury Blue Book”), available at <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Asset-Forfeiture/Documents/bluebook.pdf>.²

This chapter discusses the principal policies and procedures governing the return of forfeited assets to crime victims. Section I covers the basics of remission and restoration; section II discusses remission for insurers of victims; and section III discusses strategies for compensating victims of large fraud offenses.

I. Returning Forfeited Assets to Victims

A. Remission

Once assets have been judicially forfeited, the authority to distribute them to owners, lienholders and victims rests solely with the Attorney General. *See* 28 C.F.R. Part 9. Potential victims must be notified of the opportunity to file a petition for remission. In judicial forfeitures, notification is the responsibility of the U.S. Attorney’s Office (USAO). Known victims should be notified by mail,

¹ While section 853(i) governs forfeitures under the drug abuse prevention and control laws, it is incorporated by reference in 18 U.S.C. § 982(b)(1), which extends forfeiture authority to most other criminal offenses.

² Treasury Forfeiture Fund member agencies include the Internal Revenue Service (IRS), U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), U.S. Secret Service (USSS), and U.S. Coast Guard.

and potential unknown victims may be notified by publication. In appropriate cases, the USAO may modify the standard notice of the Victim Notification System (VNS) to incorporate notice of the forfeiture and a model petition for remission.³ The notice should instruct the victims to file petitions with the USAO that handled the civil or criminal forfeiture.

The authority to decide petitions for remission in judicial cases has been delegated by the Attorney General to the Chief of the Asset Forfeiture and Money Laundering Section (AFMLS). 28 C.F.R. § 9.1(b)(2). Petitions are decided on the basis of written documentation; there is no right to a hearing on the petition. 28 C.F.R. § 9.4(g). Unsuccessful petitioners are entitled to one request for reconsideration, which is reviewed and decided by a different ruling official within AFMLS. 28 C.F.R. § 9.4(k)(3). Judicial review of a denial of remission is not available. *See United States v. One 1970 Buick Riviera Bearing Serial No. 494870H910774*, 463 F.2d 1168, 1170 (5th Cir.), *cert. denied*, 409 U.S. 980 (1972) (Attorney General has unreviewable discretion over remission or mitigation of forfeitures).

The determination of whether a victim is entitled to remission is governed by regulation. The breadth of options available for transfer of forfeited property to victims depends on the statute under which the property is forfeited. The options are broadest in criminal forfeiture, where the Attorney General has statutory authority not only to grant petitions for remission to victims of the offense underlying the forfeiture that is the basis for the forfeiture, but also to “*take any other action to protect the rights of innocent persons which is in the interests of justice* and which is not inconsistent with the provisions of [the applicable chapter or section].” 21 U.S.C. § 853(i)(1), incorporated by reference in 18 U.S.C. § 982 (emphasis added). In civil forfeitures, the statutory authority is less broadly stated, and the Attorney General’s authority to remit forfeited assets does not appear to extend to other such “innocent persons...”. *See*, e.g., 18 U.S.C. § 981(d); 21 U.S.C. § 881(d).

In administrative forfeitures, the authority to decide petitions for remission or mitigation rests with the seizing agency.⁴ It is the responsibility of the agency to notify potential victims of the opportunity to file a petition for remission. The remission decision is at the discretion of the forfeiting agency and not reviewable in court. Questions regarding administrative forfeiture policies and procedures should be directed to the forfeiting agency. When petitions have been filed for both administratively and judicially forfeited assets in the same case, the seizing agency must coordinate with the forfeiture Assistant United States Attorney (AUSA) assigned to the case.

Many forfeiture cases begin administratively and become judicial when a party files a claim challenging the agency forfeiture. In such cases, the petition must be adjudicated by AFMLS. However, the petitioner need not submit a second petition. The seizing agency should forward the petition to the USAO to further submit to AFMLS.

A.1 Standards for victims, 28 C.F.R. Part 9

The factual basis and legal theory underlying the forfeiture will determine who qualifies as a victim under 28 C.F.R. Part 9. “The term victim means a person who has incurred a pecuniary loss as a

³ VNS is a free, computer-based system developed by the Department of Justice to provide important information to victims of federal crimes.

⁴ *See*, e.g., 19 C.F.R. Parts 171 and 172.2; 26 C.F.R. Part 403, Subpart D; 28 C.F.R. § 9.1(b)(1).

direct result of the commission of the offense underlying a forfeiture.” 28 C.F.R. § 9.2 (emphasis added).⁵ Federal agencies can qualify as a victim under the regulations.

Victims may also recover losses caused by a related offense. 28 C.F.R. § 9.8(a)(1). *Related offense* means: “(1) Any predicate offense charged in a Federal Racketeer Influenced and Corrupt Organizations Act (RICO) count for which forfeiture was ordered; or (2) An offense committed as part of the same scheme or design, or pursuant to the same conspiracy, as was involved in the offense for which forfeiture was ordered.” 28 C.F.R. § 9.2.

A.2 Qualification to file

A victim may be granted remission of the forfeiture of property if the victim satisfactorily demonstrates that:

- (1) a pecuniary loss of a specific amount has been directly caused by the criminal offense, or related offense, that was the underlying basis for the forfeiture, and the loss is supported by documentary evidence including invoices and receipts; (2) the pecuniary loss is the direct result of the illegal acts and is not the result of otherwise lawful acts that were committed in the course of the criminal offense; (3) the victim did not knowingly contribute to, participate in, benefit from, or act in a willfully blind manner towards the commission of the offense, or related offense, that was the underlying basis for the forfeiture; (4) the victim has not in fact been compensated for the wrongful loss of the property by the perpetrator or others; and (5) the victim does not have recourse reasonably available to other assets from which to obtain compensation for the wrongful loss of the property.

28 C.F.R. § 9.8(a).

“The amount of the pecuniary loss suffered by a victim for which remission may be granted is limited to the fair market value of the property of which the victim was deprived as of the date of the occurrence of the loss.” 28 C.F.R. § 9.8(b). This provision presents three issues to be determined in connection with calculating a victim’s loss: (1) What property did the victim lose as a direct result of the illegal activity; (2) When was the victim deprived of it; and (3) What was the fair market value of that property at that time? The term “fair market value” is not defined in 28 C.F.R. Part 9. When the loss is property other than money, the date of the victim’s loss and the fair market value of the property on that date must be decided in order to determine the victim’s recoverable loss.

A victim’s pecuniary loss must be supported by documentary evidence. 28 C.F.R. § 9.8(a)(1) and (2). Losses that are secondary to the principal loss, such as “interest foregone or for collateral expenses incurred to recover lost property or to seek other recompense,” are not eligible for remission. 28 C.F.R. § 9.8(b). Losses are also ineligible for remission if they result from property damage or physical injuries, or from a tort associated with illegal activity that formed the basis for the forfeiture, unless the tort constitutes the illegal activity itself. 28 C.F.R. § 9.8(c). Victims who “knowingly contribute to, participate in, benefit from, or act in a willfully blind manner towards the commission of the offense, or related offense, that was the underlying basis for the forfeiture” are also ineligible for remission. 28 C.F.R. § 9.8(a)(3).

⁵ A *person* is “an individual, partnership, corporation, joint business enterprise, estate, or other legal entity capable of owning property.” 28 C.F.R. § 9.2.

A victim need not show that his or her funds are among the funds that have been forfeited in order to establish eligibility for remission. Similarly, the tracing of a particular victim's funds into a forfeited account does not give that victim priority over other victims whose funds cannot be traced.

A.3 Priority in multi-victim remission cases

Priority in the distribution of forfeited assets is given to valid owners, lienholders, federal financial regulatory agencies,⁶ and victims (in that order), who in turn have priority over official use requests and equitable sharing requests. In cases involving more than one victim, the ruling official will generally grant remission on a pro rata basis where the amount to be distributed is less than the value of the victims' losses. Additional exceptions are permitted only in rare situations, such as when pro rata distribution would result in extreme hardship to a victim or when a victim has better evidence of loss than other victims.⁷ However, the tracing of a particular victim's funds into a forfeited account does not give that victim priority over the victims whose funds cannot be traced.

A.4 Trustees

With the consultation and approval of AFMLS, the USAO may utilize the services of a trustee in large, multiple-victim cases to assist in notifying potential victims of the opportunity to seek remission, in processing the petitions, and in making decision recommendations. 28 C.F.R. § 9.9(c). The USAO must also consult with the lead seizing agency in the selection of the trustee.

USAOs and agencies interested in utilizing the services of a trustee to support the remission and restoration processes are encouraged to consult early with AFMLS. AFMLS recently awarded a contract to three vendors to provide claims administration support services in cases that will result in forfeited funds being returned to victims through the remission or restoration processes. This national contract simplifies procurement actions, and also streamlines petition review and payment distribution in victim cases where highly experienced and expert firms are required to handle the volume of petitioners.

A.5 Additional grounds for denial of remission to victims

Remission to victims may be denied: (1) if determination of the pecuniary loss to be paid to individual victims is too difficult; (2) if the amount to be paid to victims is small compared to the expense incurred by the Government in deciding the victims' claims; or (3) if the total number of victims is large and the amount available for payment to victims is so small as to make granting payments to victims impractical. 28 C.F.R. § 9.8(d).

A.6 Timeliness

Victims must file petitions for judicially forfeited assets generally within 30 days after receiving notice. However, when a victim fails to submit a valid petition within 30 days, exceptions may be allowed for good cause based on the particular circumstances of the case.

⁶ A federal financial regulatory agency is generally entitled to priority of distribution over non-owner victims for losses and expenses incurred in its capacity as receiver of a failed institution. This priority, codified in the federal regulations at 28 C.F.R. § 9.8(h), is applicable only for reimbursement of the Federal Deposit Insurance Corporation's payments to claimants and creditors of the institution and/or reimbursement of insurance fund losses under 18 U.S.C § 981(e)(3), and for fraud losses associated with the sale of assets held in receivership pursuant to § 981(e)(7).

⁷ 28 C.F.R. § 9.8(e).

B. Restoration

In 2002, the Criminal Division issued procedures, known as the Restoration Procedures, designed to simplify and accelerate the return of forfeited property to victims. These procedures apply where: (1) both restitution to compensate victims and a related forfeiture (either civil, criminal, or administrative) have been ordered, (2) the victims and amounts listed in the restitution order essentially conform to the victims and amounts that would have been paid through the forfeiture remission process, and (3) other property is not available to satisfy the order of restitution.

The Restoration Procedures enable the United States to complete the forfeiture and recover costs. This permits victims to obtain fair compensation from the forfeited assets, in accordance with the court's restitution order, without having to file petitions for remission with the Government and await decisions on the same. Restoration is a standardized alternative procedure to petitions for remission, designed to accommodate victims and the courts to the furthest extent possible, while still meeting the statutory and regulatory requirements for remission.

B.1 Background

Because forfeited assets are property of the United States, courts and defendants lack authority to use them to satisfy a defendant's criminal debts, including fines or restitution obligations. *See United States v. Trotter*, 912 F.2d 964 (8th Cir. 1990). In many cases, defendants are left with little or no property after the forfeiture is completed. Thus, prior to the issuance of the Restoration Procedures, the Government often seized property, and then made it available to satisfy court-ordered restitution rather than complete the forfeiture. This process, while cumbersome, worked where the seized assets were cash or bank accounts, and where there were no competing claims for the property. However, where assets needed to be maintained and sold, or where third parties claimed an interest in the property, completion of the forfeiture was necessary, and victims were generally required to take the additional step of filing petitions for remission in order to recover any part of the forfeited assets. Under the Restoration Procedures, the Government may now forfeit property and transfer the proceeds to the court in satisfaction of the defendant's order of restitution. The Attorney General's restoration authority has been delegated to the Chief of AFMLS, pursuant to Attorney General Order No. 2088-97 (June 14, 1997).

B.2 How the restoration process works

The Restoration Procedures require both a court order of restitution *and* an order (or declaration) of forfeiture. The Restoration Procedures also allow, when requested by the USAO, preliminary review of the expected restitution and forfeiture order by AFMLS so that AUSAs may advise the court of the Department's intended distribution of the property.

To use the Restoration Procedures, the USAO must send the Chief of AFMLS a copy of the Judgment in a Criminal Case containing the order of restitution and a copy of the forfeiture order, along with a written request signed by the U.S. Attorney, or his or her designee, that includes the representations set forth at section I.B.3. Once the Chief of AFMLS has approved the request for restoration, AFMLS notifies both the USAO and the custodian of the property. The custodian then transfers the net proceeds of the forfeiture to the clerk of court for distribution pursuant to the order of restitution.

Restoration is appropriate only when the distribution pursuant to the restitution order is essentially the same as the distribution that would be obtained through the remission process. Prosecutors wishing to

use the Restoration Procedures must work with the seizing agency, probation officer and the court to make sure that the court's restitution order lists the names of all victims and the amount of restitution due to each. Prosecutors also should be cognizant that restitution is generally available for a much broader category of harms than may be satisfied through remission, which is allowed only for pecuniary losses caused by the offense underlying the forfeiture or a related offense. Moreover, 28 C.F.R. § 9.8(b) provides that the victim's loss is limited to the fair market value of the property of which the victim was deprived, as of the date of the loss. No allowance is made for interest forgone, lost profits, or collateral expenses incurred to recover lost property or to seek other recompense. Thus, restoration may not be used where a significant portion of the losses covered by the restitution order relate to bodily harm, property damage, future expenses and collateral expenses such as legal, accounting, or security expenditures incurred in trying to correct the harm caused by the crime. If the restitution order is not amenable to the restoration process, the USAO will be advised and assets may be distributed through the remission process.

B.3 Representations

The Restoration Procedures are designed to accomplish results that are consistent with the standards that apply to the remission of forfeited assets at 28 C.F.R. § 9.8. In order to ensure that such standards are met, the U.S. Attorney, or his or her designee, must inform AFMLS of the following, in writing and accompanied by a signature, as part of the request for restoration:

- All known victims have been properly notified of the restitution proceedings and are properly accounted for in the restitution order. This representation is intended to ensure that no victims have been left out of the restitution order and that all are treated fairly in the order.
- To the best of the U.S. Attorney's, or designee's, knowledge and belief after consultation with the seizing agency, the losses described in the restitution order have been verified, comport with the remission requirements, and reflect all sources of compensation received by the victims, including returns on investments, interest payments, insurance proceeds, refunds, settlement payments, lawsuit awards, and any other sources of compensation for their losses. This is to avoid double recovery by victims who may already have been compensated for part of their losses.
- To the best of the U.S. Attorney's, or designee's, knowledge and belief after consultation with the seizing agency, reasonable efforts to locate additional assets establish that the victims do not have recourse reasonably available to obtain compensation for their losses from other assets, including those owned or controlled by the defendants. This is to ensure that restoration does not confer an undue benefit on the defendant.
- There is no evidence to suggest that any of the victims knowingly contributed to, participated in, benefitted from, or acted in a willfully blind manner, toward the commission of the offenses underlying the forfeiture or a related offense. This is to prevent the return of forfeited property to those who essentially took part in the conduct that led to the forfeiture.

The USAO must ensure that the time for filing an appeal challenging either the restitution order or the forfeiture has passed, or all relevant appeals have been adjudicated, prior to submitting the restoration request to AFMLS.

Because restitution and forfeiture are mandatory and independent parts of a criminal sentence, the forfeited assets may not be used to satisfy the restitution order if other assets are available for that purpose. Typical examples of this situation might involve corporations that have extensive holdings

that are not subject to forfeiture, or individuals who have property that exceeds the amount subject to forfeiture. The statutes governing restitution permit the Government to enforce the restitution order as a final judgment against almost all of the defendant's property, not just facilitating property or fraud proceeds that may be subject to forfeiture.

B.4 Payment

If the assets are to be restored to the victims listed in the restitution order, AFMLS will notify the USAO and property custodian in writing. The custodian will then transfer the net forfeited proceeds to the clerk of court for distribution pursuant to the restitution order. Payments will be made *only* in accordance with the court's restitution order. If the forfeited assets are not sufficient to fully satisfy the order, payment will be made on a pro-rata basis, according to the losses listed in the restitution order.

B.5 Benefits

The Restoration Procedures are intended to assist AUSAs in their use of forfeited assets to compensate victims and to assist victims in their pursuit of compensation. Victims will not need to file petitions for remission, and the process of returning funds to victims will typically be faster. The forfeiture will be completed so that costs can be recovered and third-party rights extinguished. Proceeds from civil, criminal, and administrative forfeitures⁸ can be handled together and applied to restitution. Forfeiture AUSAs and agents will get credit for their work, and assets will be distributed primarily as they would have been under the remission regulations.

C. Timing

Civil and administrative forfeiture actions can proceed faster than the parallel criminal case. Consequently, assets might be forfeited, equitably shared, placed into official use, or remitted to victims who file petitions long before restitution is ordered, and would not be available for application to the restitution order. To avoid this outcome, the USAO must coordinate with the seizing agency to ensure the retention of property for remission or restoration. In addition, the USAO must place a "hold" on the distribution of seized assets in the Consolidated Assets Tracking System (CATS). If the forfeited property has already been transferred, placed into official use, or equitably shared, CATS will not accept the hold request and will transmit an error message to the CATS user. Where appropriate, such transfers that erroneously occur before victims have received compensation may be reversed at the discretion of the Chief of AFMLS or the Director of TEOAF (for seizures by TFF member agencies) to make the property available for restoration.

Because CATS is not the TFF system of record, the USAO must request that the TFF preserve the asset in cases where restitution may be ordered or where remission or restoration may occur. To ensure the preservation of the forfeited property in judicial cases involving TFF agencies, the USAO must also notify and send a copy of the restoration request to the TFF seizing agency. *See Guidelines for Treasury Forfeiture Fund Agencies on Refunds Pursuant to Court Orders, Petitions for Remission, or Restoration Requests*, section VI.B.2.a.i.⁹

⁸ In administrative forfeitures involving TFF member agencies, the USAO must obtain the written concurrence of the local and/or Headquarters TFF seizing agency before AFMLS may approve restoration of forfeited funds for purposes of criminal restitution. *See Guidelines for Treasury Forfeiture Fund Agencies on Refunds Pursuant to Court Orders, Petitions for Remission, or Restoration Requests*, sections VI.B.2.a.ii; VI.B.3.b. TEOAF policy does not permit the release of administratively forfeited funds to crime victims without the prior approval of the TFF seizing agency. *See id.* at section VI.B.2.a.ii.2.

⁹ Available at <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Asset-Forfeiture/Documents/bluebook.pdf>.

D. Termination of forfeiture and direct payment of assets to victims

D.1 Overview

In some situations, it may be preferable to move to vacate the forfeiture proceeding and request that the court direct that the property be turned over as restitution directly to the victim pursuant to 18 U.S.C. §3663A(b)(1)(A), or be transferred to the clerk of court to be paid to the victim. This approach may be preferable to remission or restoration when the victim is entitled to restitution for non-pecuniary harm or other collateral costs that are not compensable under the remission regulations. In addition, termination of forfeiture may be desirable in multiple-victim fraud cases arising in jurisdictions with unfavorable case law concerning constructive trusts. *See* “Litigation of Multiple-Victim Fraud Cases in the Ninth and Eleventh Circuits,” section III. Further, victims may receive compensation faster under this approach than awaiting a final order of forfeiture and a decision from the Attorney General regarding remission or restoration. Termination of forfeiture is appropriate only if no final order of forfeiture has been entered, as once property is forfeited to the Government, the Attorney General is solely responsible for its disposition. 18 U.S.C. § 982(b)(1) (incorporating 21 U.S.C. § 853(i)). If payment is to be made to the victim through the clerk of court, the property subject to forfeiture must be liquid, as the clerk cannot liquidate real or personal property.¹⁰

D.2 Is a prosecutor bound, ethically or otherwise, to forego forfeiture in favor of restitution?

Forfeiture and restitution are two separate components of many criminal sentences. Both are mandatory upon conviction. In 1996, the Mandatory Victims Restitution Act (MVRA) made restitution mandatory for most federal crimes where a victim suffers a loss. *See* 18 U.S.C. § 3663A(a)(1).¹¹ If a court orders restitution, it must order full restitution for the victim’s loss, regardless of the defendant’s ability to pay. E.g., *United States v. Newman*, 144 F.3d 531 (7th Cir. 1998) (“Under the MVRA, a defendant’s financial status is relevant only to fixing a payment schedule for the mandated restitution”). Likewise, courts must order forfeiture when a defendant is convicted of a statute that provides for forfeiture as part of the penalty. *See*, e.g., 18 U.S.C. § 982: “The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, *shall order* that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.” (emphasis added); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (“Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applie[s]”); *United States v. Johnston*, 199 F.3d 1015, 1022 (9th Cir. 1999) (criminal forfeiture is mandatory and designed to ensure that a defendant does not profit from his crimes). Given the mandatory nature of the two components of a sentence, it is entirely appropriate for a defendant to pay both a forfeiture and restitution. *See United States v. Kalish*, 626 F.3d 165, 169-70 (2d Cir. 2010); *United States v. Emerson*, 128 F.3d 557, 566-67 (7th Cir. 1997); *United States v. Tencer*, 107 F.3d 1120, 1135 (5th Cir. 1997) (affirming restitution order for \$451,000 to fraud victims plus criminal forfeiture of \$1 million, which included the fraud proceeds plus commingled funds). And defendants have

¹⁰ *See also* Chap. 11, Sec. II of this *Manual*, “Is a Prosecutor Bound, Ethically or Otherwise, to Forego Forfeiture in Favor of Restitution?”

¹¹ “Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense....”

no right to a credit against a restitution order for the amount forfeited. *See United States v. Taylor*, 582 F.3d 558, 567 (5th Cir. 2009); *United States v. Bright*, 353 F.3d 1114, 1122-32 (9th Cir. 2004); *United States v. Alalade*, 204 F.3d 536 (4th Cir. 2000).

The Justice for All Act, 18 U.S.C. § 3771, obligates “officers and employees of the DOJ and other departments and agencies engaged in the detection, investigation or prosecution of crime [to] make their best efforts to see that crime victims are...accorded the rights...” under the act,¹² including the right to full and timely restitution as provided by law. The perceived tension between forfeiture and restitution emerges when, as is often the case, a defendant lacks the financial ability to pay both the forfeiture and restitution. When a defendant lacks the resources to make full restitution, DOJ policy is to collect and marshal assets for the benefit of victims using available means.¹³ These means include discontinuance of a forfeiture before a final order and asking the court to direct the custodian to turn over “liquid assets” (e.g., assets that do not require a sale to convert the property to cash) to the clerk of court to be applied to restitution; the forfeiture of the defendant’s assets and the handling of victim claims through the petition for remission or mitigation process; or the completion of the forfeiture action and the restoration of forfeited assets to victims through a restoration process approved by AFMLS.

At present, there is only a limited ability to restrain assets prior to trial solely for the purpose of restitution.¹⁴ The restraint or seizure mechanisms provided by the asset forfeiture statutes are often the only effective mechanisms to prevent a criminal defendant from dissipating assets prior to sentencing. As there are at least three means whereby restrained or forfeited property may be turned over to victims, there is nothing improper in seeking forfeiture in cases where the prosecutor knows early on that a defendant is unlikely to be able to pay restitution if the assets are forfeited. Restraint and forfeiture do not preclude those same assets from being turned over to victims. Indeed, without the restraint and seizure mechanisms of the forfeiture statutes, a victim has much less chance of ever receiving restitution.

Thus, a prosecutor who uses forfeiture tools as a means to provide remission or restoration of assets to crime victims fulfills any obligation that prosecutor may have under the Justice for All Act to crime victims.¹⁵ Various courts have acknowledged this use of the forfeiture statutes. *See United States v. O’Connor*, 321 F. Supp. 722 (E.D. Va. 2004) (although defendant has no right to use forfeited funds to satisfy a restitution order, the Government may, pursuant to 21 U.S.C. § 853(i)(1), apply the forfeited funds for benefit of the victims through restoration or remission); *United States v. Lavin*, 299 F.3d 123 (2d Cir. 2002) (instead of pursuing forfeiture, Government used seized funds to satisfy restitution order).

¹² 18 U.S.C. § 3771(c)(1).

¹³ *See also* Attorney General’s Guidelines for Victim and Witness Assistance, Art. V, Sec. H.2 (rev. May 2012).

¹⁴ Under 18 U.S.C. § 1345(a)(1), the pre-trial restraint of assets is authorized in fraud-type cases, but only in limited circumstances.

¹⁵ Adverse court of appeals decisions have made the administrative and civil forfeiture of fraud proceeds impractical in cases that involve large numbers of victims and that must be filed in those circuits. *See* section II.

E. Comparison of judicial remission and restoration

<i>Petition for Remission</i>	<i>Restoration</i>
There is no need for a criminal conviction of person from whom property is forfeited. Judicial forfeiture orders may be criminal or civil. Seizing agencies decide petition for remission of administratively forfeited assets.	Restoration requires a criminal conviction, an Order of Restitution, and a criminal, civil, or administrative forfeiture which is related to the victim's loss.
The USAO, in cooperation with the investigative agency, sends notice to all known victims of the offense underlying the forfeiture.	The USAO works with the investigative agency and probation office to identify victims and determine their losses.
In judicial forfeitures, the victim files petition for remission with the USAO.	The victim is not required to file a petition but may be required to submit information to the investigative agency or probation office.
The USAO requests the investigative agency to prepare a report and recommendation. The USAO makes a recommendation and forwards the petition package to AFMLS.	The USAO submits a restoration request, including the four required representations, to AFMLS. <i>See</i> section I.B.3
The Attorney General, through AFMLS, reviews the petition and may grant remission to eligible victims.	The Attorney General, through AFMLS, reviews the restoration request and may restore forfeited property to victims identified in the restitution order.
The victim must file a petition in order to receive compensation.	The victim must be named in restitution order. "Hybrid" cases with both remission and restoration are not acceptable. All forfeited proceeds are turned over to the court for distribution to victims.
The custodian of forfeited asset distributes the net proceeds directly to victims.	The custodian of the forfeited asset transfers the net proceeds directly to the clerk of the court.

II. Constructive Trusts in Multiple-Victim Fraud Cases

While the courts generally agree that fraud victims do not retain legal title in money paid voluntarily into a fraud scheme, the courts are increasingly recognizing constructive trusts in favor of victims. Under this equitable remedy, the perpetrator of the fraud holds title to the victim's funds in trust for the benefit of the victim. This legal theory is troublesome in forfeiture cases involving multiple victims, because it can transform the forfeiture case into a cumbersome liquidation proceeding in which all victims compete against each other and against the Government for the seized funds. The Government should generally oppose a claim of constructive trust in such cases, so that the Attorney General can return the funds to the victims through the orderly remission process.

In *United States v. \$4,224,958.57 ("Boylan")*, 392 F.3d 1002 (9th Cir. 2004), the Ninth Circuit held that victims of a large fraudulent investment scheme had established a sufficient legal interest in the seized proceeds through a constructive trust to confer upon them standing to contest the forfeiture. Under this holding, government attorneys litigating forfeiture cases may be required to identify all potential victims of the fraud, notify them of the forfeiture action, and afford them an opportunity to file claims in the judicial proceeding. A related difficulty is that a constructive trust generally requires a victim to trace his or her money to the seized funds, which may warrant extensive discovery and evidentiary hearings. Some judicial circuits have followed the holding of *Boylan* in forfeiture cases. Government attorneys should therefore consult their circuit's case law in responding to constructive trust claims in their district.

In litigating forfeiture cases in circuits that recognize constructive trusts, Government attorneys may elect to oppose victims' individual claims of constructive trust on the merits, and further argue that recognition of the trust would result in unfair priority to the claimant, contrary to the equitable principles underlying the trust. The courts should also be advised that forfeiture will enable all victims to have the opportunity to recover the funds on the pro rata basis through the Attorney General's remission authority. *See* 28 C.F.R. § 9.8(a)(1), (e).